No. 625

Nos. 24345, 24346, 24347

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United States Court of Appeals

For the Second Circuit

ESTATE OF MARY LOIS K. McINTOSH, deceased, RUSSELL L. McINTOSH and EMPIRE TRUST COMPANY, Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ESTATE OF MARY LOIS K. McINTOSH, deceased, RUSSELL L. McINTOSH and ST. LOUIS UNION TRUST COMPANY, Trustees and Transferees,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ESTATE OF MARY LOIS K. McINTOSH, deceased, EUGENE KILPATRICK PERRY, Transferee,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition to Review Decisions of the Tax Court of the United States

APPENDIX TO BRIEF FOR PETITIONERS

PULLMAN, COMLEY, BRADLEY & REEVES,
Attorneys for Petitioners in Nos. 24345 & 24346,
886 Main Street,
Bridgeport 3, Connecticut.

PARKER, DURYEE, BENJAMIN, ZUNINO & MALONE,
Attorneys for Petitioner in No. 24347,
1 East 44th Street,
New York 17, New York.

ROBERT M. BENJAMIN,
ARTHUR M. COMLEY,
RAYMOND A. CARTER,
FREDERICK POPE, JR.,
SIDNEY D. ROSOFF,
of Counsel.

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United States Court of Appeals

For the Second Circuit

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Statement Under Rule 15(b)

The first two of these proceedings were commenced in the Tax Court of the United States October 29, 1953, and the third was commenced October 30, 1953.

The parties to the proceedings in the Tax Court and to these review proceedings are Estate of Mary Lois K. McIntosh, Russell L. McIntosh and Empire Trust Company, Executors (first proceeding; Tax Court Docket No. 51124); Russell L. McIntosh and St. Louis Union Trust Company, Trustees and transferees of certain assets which the

Commissioner of Internal Revenue included in the Estate of Mary Lois K. McIntosh for Federal estate tax purposes (second proceeding; Tax Court Docket No. 51125); Eugene Kilpatrick Perry, a transferee of those assets (third proceeding; Tax Court Docket No. 51130); and, in all three proceedings, the Commissioner of Internal Revenue.

The petitions in the first two proceedings were filed October 29, 1953; amendments to the petitions were filed December 1, 1953; the answers were filed December 28, 1953; motions for leave to amend the answers were made and granted at the hearing before the Tax Court on June 21, 1955, and amendments to the answers were filed June 21, 1955; replies to the amended answers were filed August 9, 1955.

The petition in the third proceeding was filed October 30, 1953; an amendment to the petition was filed December 1, 1953; the answer was filed December 28, 1953; a motion for leave to amend the answer was made and granted at the hearing before the Tax Court on June 21, 1955, and an amendment to the answer was filed June 21, 1955; the reply to the amended answer was filed August 9, 1955.

The three proceedings were consolidated for trial, and the trial was had on June 21, 1955, before Judge Norman O. Tietjens.

Findings of fact and an opinion in the three proceedings were filed January 18, 1956.

The decisions in the three proceedings were entered on June 6, 1956. The petition for review in each proceeding was filed September 4, 1956.

By stipulation of the parties filed November 8, 1956, the three petitions for review were consolidated for briefing in this Court.

Decision in First Proceeding, Docket No. 51124

(Rec. 658)

THE TAX COURT OF THE UNITED STATES

WASHINGTON

Estate of MARY LOIS K. McINTOSH, deceased, RUSSELL L. McINTOSH and EMPIRE TRUST COMPANY, Executors, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 51124

Pursuant to the determination of the Court, as set forth in its Opinion filed January 18, 1956, the parties having filed on June 4, 1956, an agreed computation of tax, now, therefore, it is

ORDERED and DECIDED: That there is a deficiency in estate tax in the amount of $235,872.10.

ENTER:

(Signed) NORMAN O. TIETJENS
Judge

Entered Jun 6 1956

(Seal)

Decision in Second Proceeding, Docket No. 51125

(Rec. 659)

THE TAX COURT OF THE UNITED STATES

WASHINGTON

Estate of MARY LOIS K. MCINTOSH, deceased, RUSSELL L. MCINTOSH and ST. LOUIS UNION TRUST COMPANY, Trustees and Transferees, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 51125

Pursuant to the determination of the Court, as set forth in its Opinion filed January 18, 1956, the parties having filed on June 4, 1956, an agreed computation of tax, now, therefore, it is

ORDERED and DECIDED: That there is transferee liability for estate tax due from the Estate of Mary Lois K. McIntosh, deceased, in the amount of $235,872.10.

ENTER:

(Signed) NORMAN O. TIETJENS
Judge

Entered Jun 6 1956

(Seal)

Decision in Third Proceeding, Docket No. 51130

(Rec. 660)

THE TAX COURT OF THE UNITED STATES

WASHINGTON

Estate of MARY LOIS K. McINTOSH, deceased, EUGENE KILPATRICK PERRY, Transferee. Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 51130

Pursuant to the determination of the Court, as set forth in its Opinion filed January 18, 1956, the parties having filed on June 4, 1956, an agreed computation of tax, now, therefore, it is

ORDERED and DECIDED: That there is transferee liability for estate tax due from the Estate of Mary Lois K. McIntosh, deceased, in the amount of $235,872.10.

ENTER:

(Signed) NORMAN O. TIETJENS
Judge

Entered Jun 6 1956

(Seal)

Findings of Fact and Opinion of the Tax Court

(Rec. 617-642)

25 T. C. No. 91

[Same Captions.]

Docket Nos. 51124, 51125, 51130. Filed January 18, 1956.

1. Estate Tax—Gross Estate—Sec. 811(d)(2).—Decedent in 1929 through a nominee set up a spendthrift trust for her benefit for life, remainder on death to her then heirs at law. She retained a power to appoint by will which she relinquished in 1943 to avoid estate taxes. *Held*, the trust was revocable under Missouri law where is was created. *Held, further*, the power was relinquished in contemplation of death. Accordingly the value of the corpus was includible in gross estate.

2. Deductions for Administration Expenses and Claims—Sec. 812(b)(5).—Decedent's estate took a deduction of $15,000 for a dependent's allowance and later amended pleadings to claim $18,000, which was paid pursuant to order of local probate court. Respondent allowed $12,000. On facts, *held*, respondent's allowance approved. No more than $12,000 shown to have been "reasonably required" for widower's support.

Arthur M. Comley, Esq., and Frederick Pope, Jr., Esq., for the petitioners in Docket Nos. 51124 and 51125.

Raymond A. Carter, Esq., and Sidney D. Rosoff, Esq., for the petitioner in Docket No. 51130.

James R. McGowan, Esq., for the respondent.

Findings of Fact and Opinion of the Tax Court

The Commissioner determined a deficiency of $254,759.76 in estate tax to be due from the estate of Mary Lois K. McIntosh. The same deficiency has been determined against the other petitioners as transferees.

The questions for decision are (1) whether the value of the corpus of a certain trust is includible in decedent's gross estate and (2) whether the full amount of $18,000 paid for the support of the decedent's husband during settlement of the estate was a proper deduction rather than the $12,000 allowed by the Commissioner.

In the event a deficiency is determined, transferee liability is conceded by petitioners in Dockets No. 51125 and No. 51130.

FINDINGS OF FACT.

The stipulated facts are so found and the stipulation and exhibits thereto are included herein by reference.

Mary Lois K. McIntosh (hereafter sometimes called the decedent) died on May 21, 1949, aged 63 years, 9 months. Her executors filed an estate tax return on August 21, 1950, with the collector of internal revenue for the district of Connecticut.

In 1928 the decedent was sued in an alienation of affections suit and as a result she turned over to her then husband certain negotiable securities for management. She soon became apprehensive of her husband's management of the property and sought assistance in securing its return.

These troubles worried the decedent (who was then Mary Lois K. Perry) and for the purpose of protecting her properties against herself and generally against the misapplication of her funds she arranged for the creation of a trust on February 16, 1929. On that date she conveyed certain of her properties to Thomas J. Boland, a young lawyer in

the office of Paul Bakewell, Jr. Boland, as nominal settlor, on the same day conveyed the properties to the St. Louis Union Trust Company and Bakewell, as trustees, under a written trust instrument. The use of Boland as nominal settlor was made in an attempt to avoid the rule of Missouri law that a settlor cannot create a spendthrift trust for his own benefit. The trust that was created and is here involved is a spendthrift trust.

The trust instrument provided, *inter alia*:

> * * * said trust shall continue for the sole use and benefit of Mary Lois K. Perry, now of New York City, New York, for and during her natural life, and during said trust the Trustees shall pay the taxes on said real estate and all proper charges and expenses in connection with the management and administration thereof. After the payment of such taxes and such proper charges and expenses, the Trustees hereunder shall pay the entire net income from the trust estate as hereby created in monthly installments of as nearly an equal amount as may be conveniently possible to the said Mary Lois K. Perry.
>
> During the continuance of the trust hereby created, the Trustees shall have and hold the trust estate, and the beneficiary thereof, Mary Lois K. Perry, from time to time, shall enjoy the same subject to the following conditions, limitations, powers and discretions in addition to those hereinbefore specified, to wit:
>
> The Trustees shall receive, manage and control the trust estate and the property thereof as the Trustees may deem best for the interests of the beneficiary: * * *
>
> * * * * * * *
>
> The Trustees shall, from time to time, collect the rents and profits of and from the real estate hereby

conveyed, and in the event of any sale thereof, and the reinvestment of proceeds of such sale, shall collect the rent, interest, dividends or profits from any such investments made by the Trustees and shall disburse the net income as herein authorized and directed.

In the event that there shall come into the hands of the Trustees hereunder any stock in any corporation upon which distribution or disbursements of stock may be made in the manner or form of stock dividends, then all of such stock dividends that may be so received by the Trustees hereunder shall, by the Trustees hereunder, be regarded as income, and not as corpus, and any and all stock dividends shall be distributed and delivered to the beneficiary hereunder as income.

The beneficiary hereunder, Mary Lois K. Perry, shall not have power to sell, assign, pledge, encumber or anticipate any interest created by this instrument, whether that interest be in the income or the principal of the trust estate; nor shall the interest therein of the said beneficiary be liable for her debts, nor subject to any suit at law or equity, it being the purpose of this instrument to provide that no right to alienate or create a charge upon the income from the trust estate hereby created shall exist or vest in the beneficiary hereunder, Mary Lois K. Perry, until the said income shall have been actually paid over to her.

If any suit be filed, the purpose of which is to reach any interest of Mary Lois K. Perry in the trust estate, or to make same liable for her debts in any manner before the income therefrom shall have been actually transferred or paid over to her, then, until any such suit shall have been finally determined, the right of the beneficiary hereunder,

Mary Lois K. Perry, to any payment from the trust estate shall stand suspended and be unenforcible.

While any such suit is pending, however, the Trustees hereunder may, in their discretion, apply such portion of the income from the trust estate as they may see fit for the maintenance and support of the said Mary Lois K. Perry.

The right of Mary Lois K. Perry as beneficiary hereunder to receive the income from the trust estate created by this instrument shall be for her sole and separate use, and free and clear of and from any claim or right, interest or control by any husband of the said Mary Lois K. Perry.

On the death of the said Mary Lois K. Perry, the trust hereby created shall end, and the entire trust estate created by this instrument, together with any and all accumulated and undistributed income therefrom, shall go to such parties and under such terms and conditions as the said Mary Lois K. Perry may, by her last will, direct. In the event that the said Mary Lois K. Perry shall die intestate, or should fail to exercise said power by her last will, then, on her death, the entire trust estate hereby created, together with any and all accumulated and undistributed income therefrom, shall go and pass to the then heirs at law of the said Mary Lois K. Parry [sic], under the statutes of descent and distribution of the State of Missouri, free of any trust whatever, provided, however, that any portion or portions which shall pass to any heirs at law of the said Mary Lois K. Perry who are then minors, shall not pass to such minors directly, but the portions of any such minor heirs at law shall continue with the said Trustees in trust for them respectively until they respectively become of legal age, then, to be transferred and paid to them free of trust. During the continuance of any

such trust for minors the Trustees shall pay or apply the net income from such trust estate for the support, education and maintenance of such minor or minors.

During the continuance of any such trust for minors, the Trustees shall have the same duties and the same powers as are given them by this instrument with regard to the trust hereby created for the life of Mary Lois K. Perry.

The trust instrument also provided that on the death, resignation or incapacity of Paul Bakewell as trustee, "then the beneficiary hereunder, Mary Lois K. Perry, shall have the right and power to nominate and appoint a successor individual Trustee"; and further provided that "at any time or times during the continuance of the trust as hereby created, the beneficiary, Mary Lois K. Perry, in her sole discretion, shall have the right to appoint a successor or successors from time to time to the St. Louis Union Trust Company," with the limitation that such successor should be a corporate fiduciary located in St. Louis.

On May 27, 1929, Paul Bakewell addressed to the decedent a written resignation as co-trustee, "such resignation to be effective at your pleasure, whenever accepted by you."

The decedent divorced Eugene Perry in 1931 and married Russell L. McIntosh later in that year.

On May 14, 1934, she accepted the written resignation of Paul Bakewell as co-trustee, which written resignation had been in her possession since May 27, 1929, and on the following day she appointed her husband, Russell L. McIntosh, as successor trustee.

On June 24, 1941, the St. Louis Trust Company wrote to decedent in part as follows:

Under the terms of your trust fund with us you are not able to make any disposition of the income

other than to receive it yourself. You cannot make a valid assignment of this income to your son, or in fact to any one, as it appears from the terms of this trust that the intention was to be certain that you personally receive the income produced by this trust fund. You do have the right to dispose of this fund in your will but from a tax standpoint it would seem desirable, if it is your desire that your son have this property, that you do not exercise this right.

You should, of course, have a will disposing of the property that you have other than that which is contained in this trust estate. The federal tax authorities under present practice tax the exercise of a power of disposition the same as if you owned the property if the power of disposition is exercised. If this power to dispose of the trust property is not exercised and this property is allowed to go to your son under the trust agreement, there would be a definite tax advantage. This does not mean that you shouldn't make a will. We strongly recommend that you have your attorney draw your will and advise you on these matters as we cannot undertake to give legal advice, and we would suggest that in the drafting of your will the tax situation be given full consideration.

Decedent had executed a will on May 10, 1938, with a codicil dated April 8, 1936, in which she exercised the power of appointment contained in the trust instrument. As a result of the suggestion made in the letter of June 24, 1941 an attorney was consulted and a new will was executed on July 14, 1941, in which the decedent specifically refrained from exercising the power.

Later, on May 27, 1943, in accordance with its policy of reviewing all trust instruments providing for a power of

appointment, the Trust Company advised the decedent by letter that her powers under the trust instrument should be reviewed in the light of changes in the tax laws contained in the 1942 Revenue Act. Following this advice an attorney was employed. He advised that the property in the trust would be taxable as part of the decedent's estate unless the power of appointment was released by her before March 1, 1944. Accordingly, the decedent executed the following "Release of Power" on November 4, 1943:

> WHEREAS, the undersigned is desirous of releasing and relinquishing the said power of appointment forever to, and in favor of, the persons who may be or become entitled to receive the property heretofore subject to the said power of appointment in the event that such power be not exercised,
>
> NOW, THEREFORE, the undersigned does hereby, irrevocably and forever, release and relinquish all power which she now has, or at any time hereafter may have had, to direct, nominate, or appoint the parties to whom the Trust Estate created by the Deed of Trust dated February 16, 1929, made by Thomas J. Boland, and any and all accumulated and undistributed income therefrom, shall go upon the termination of the said Trust, or to impose any terms and conditions with respect to the final distribution of said Trust Estate, and
>
> The undersigned does hereby covenant with Russell L. McIntosh and St. Louis Union Trust Company as Trustees of said Trust, for and in behalf of the heirs at law of the undersigned, under the statutes of descent and distribution of the State of Missouri, and with Eugene Kilpatrick Perry, the sole apparent heir at law of the undersigned under such statutes, that there is not now in existence any will or other testamentary document executed by her which pur-

ports to exercise the aforesaid power of appointment, and that she will not hereafter execute any such will or testamentary document.

The decedent's purpose in releasing the power of appointment was to save estate taxes. At the time she executed the release of power of appointment decedent was in good physical condition for a woman of her age, and she had no particular concern about dying.

By order of the Court of Probate, District of Norwalk, Connecticut, dated August 16, 1949, an amount of $1,000 a month was allowed for the support of decedent's husband, Russell L. McIntosh, for a period of twelve months from the date of decedent's death. By order of the same court, dated May 10, 1950, these support payments were continued for six more months. A total of $18,000 was thus received by Russell L. McIntosh and deposited to his account.

In her last will, dated December 30, 1948, decedent provided that $10,000 should be paid to her husband immediately after her death. This amount was paid on July 11, 1949.

By her will decedent placed her residuary estate in trust and directed that her husband be paid not less than $12,000 annually, in payments of $1,000 a month, from the income of the trust. The first payment to decedent's husband under this provision was made on November 10, 1950, in the amount of $4,000, representing monthly payments from June through September 1950. After November 1950, payments of $1,000 a month under the foregoing testamentary trust were made to decedent's husband.

OPINION.

TIETJENS, *Judge*: Respondent seeks to include in the estate of Mary Lois K. McIntosh the value of the property transferred in trust in 1929, on the ground that decedent was in reality the settlor of the trust and its only beneficiary, and as such she had the power to revoke the trust. Section 811(d)(2), Internal Revenue Code of 1939.[1] Another ground for inclusion asserted by respondent is that decedent's relinquishment of the power given her in the deed of trust of naming in her will the parties to receive the trust property on her death (power of appointment), was in contemplation of death. Section 811(d)(2). In opposition petitioner contends that (a) decedent was not the settlor of record of the trust and therefore under Missouri law could not exercise any of the rights of a settlor, and (b) even if petitioner were to be regarded as the settlor, the trust property is not includible in her estate as a

[1] SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * *

(d) Revocable Transfers.—

* * *

(2) Transfers on or Prior to June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

revocable transfer under section 811(d), citing *Helvering* v. *Helmholz*, 296 U. S. 93 (1935).

There is no question that the property placed in trust belonged solely to the decedent, and the parties have stipulated that Boland was a nominal settlor. The purpose of using Boland was to avoid the prohibition under the law of Missouri against a settlor's establishing a spendthrift trust for his own benefit. Under these circumstances there is little room for seriously contesting that decedent was the real settlor of the trust set up in 1929 (1 Scott, The Law of Trusts (1939), sec. 156.3; Griswold, Spendthrift Trusts (2nd Ed., 1947), sec. 487), and that for purposes of applying a federal taxing statute the transfer in trust should be considered as having been made by decedent. *Newberry's Estate* v. *Commissioner of Internal Revenue* (C. A. 3, 1953), 201 F. 2d 874, 876, 877; *Estate of Grace D. Sinclaire*, 13 T. C. 742 (1949).

Whether the trust was revocable depends on the law of the place of its creation—Missouri. *Blair* v. *Commissioner*, 300 U. S. 5 (1937). The revocability of a spendthrift trust of which the settlor was also the beneficiary was in question in *Stephens* v. *Moore*, 298 Mo. 215 (1923), 249 S. W. 601. In that case the plaintiff's mother being concerned lest plaintiff mismanage his inheritance arranged for his setting up a spendthrift trust upon reaching majority. Plaintiff transferred certain real and personal property to a trustee, who was to hold the property for the benefit of the settlor and was to have complete control and management of it. The net proceeds from the trust property were to be paid over to the settlor annually. The deed of trust contained no express power of revocation. The disposition of the trust property after the settlor's death was provided in the following terms:

> ELEVENTH. Upon my death this trust shall terminate and the trust shall pass to and vest in my legal heirs, or as may be directed in my will.

About two and a half years after the creation of the trust the settlor brought an action in equity to revoke the trust and to compel a reconveyance of the trust property. The Supreme Court of Missouri in holding the trust revocable by the settlor reaffirmed its adherence to the principle that "a completely executed trust, even though it be a voluntary one, without reservation of power of revocation, can only be revoked by consent of all the beneficiaries." In ascertaining who the beneficiaries of the trust were the court sought to determine whether the settlor had disposed of the entire fee in the trust property by disposing of the interest remaining after his death. It held that the trustee did not take an estate of inheritance under the deed of trust, since such an estate was not necessary to enable him to carry out his duties which consisted of managing the trust property; and no remainder interest, vested or contingent, was created in the settlor's heirs by the provision of the trust deed relating to the disposition of the trust property upon the settlor's death. On the latter point the court said (p. 604):

> It is the generally accepted rule that, where there is a grant to one for life, with remainder to the heirs of the grantor, there is in fact no remainder; for the limitation, though denominated a remainder, continues in the grantor as his old reversion, and does not devolve upon his heirs as purchasers, as it would if it were a remainder, but as his heirs. 23 R. C. L. 516; Akers v. Clark, supra. [184 Ill. 136, 56 N. E. 296].

Considering the whole deed of trust the court could find no indication of an intention on the settlor's part of making a disposition of his estate to take effect at his death. It therefore concluded that the settlor was the only beneficiary of the trust, and that consequently the trust was revocable. Further, the court felt that the nature of the trust was such,

it granted the trustee the powers only of an agent, and as the grant was not coupled with an interest or supported by independent consideration, it was revocable at the grantor's pleasure.

Stephens v. *Moore* was subsequently cited with approval for the principle that a trust may be revoked with the consent of all the beneficiaries in *Ketcham* v. *Miller*, 37 S. W. 2d 635, 640 (1931) and in *Krause* v. *Jeannette Inv. Co.*, 333 Mo. 509 (1933), 62 S. W. 2d 890, 895. See generally 3 Scott, The Law of Trusts (1939), secs. 338, 339; 2 Restatement of the Law of Trusts (1935), sec. 337. As to the nature of the interests created by language like that in paragraph eleventh of the deed of trust in *Stephens* v. *Moore*, the law of Missouri, so far as we can ascertain, continues to be that in the absence of a showing of a contrary intention no interest is created in the grantor's heirs. *Davidson* v. *Davidson*, 350 Mo. 639 (1943), 167 S. W. 2d 641; and Note: "The Doctrine Of Worthier Title In Missouri," 1952 Washington University Law Quarterly 117. See generally 1 Scott, The Law of Trusts (1939), sec. 127.1; 1 American Law of Property, sec. 4.19 (1952).

Insofar as the revocability of the trust in question here, we see no material difference between this case and *Stephens* v. *Moore*, *supra*. Here, as we see it, the trustees took no estate of inheritance; their interest as trustees was to last only during the life of the settlor, except as to any portion of the trust property going to minor heirs of the settlor. This they were to continue to administer as trustees during the minority of such heirs. Provision for the disposition of the trust property upon the settlor's death was made in the following language:

> On the death of the said Mary Lois K. Perry, the trust hereby created shall end, and the entire trust estate created by this instrument, together with any and all accumulated and undistributed income

> therefrom, shall go to such parties and under such terms and conditions as the said Mary Lois K. Perry may, by her last will, direct. In the event that the said Mary Lois K. Perry shall die intestate, or should fail to exercise said power by her last will, then, on her death, the entire trust estate hereby created, together with any and all accumulated and undistributed income therefrom, shall go and pass to the then heirs at law of the said Mary Lois K. Parry [sic], under the statutes of descent and distribution of the State of Missouri, free of any trust, whatever.
> * * *

The quoted language of itself created no interest in the trust property in the settlor's heirs (*Stevens* v. *Moore*, *supra*); and there does not otherwise appear an intention on the decedent's part to provide her heirs with such an interest at the time the trust was created. It is apparent from the circumstances of the creation of the trust that her primary purpose was to put certain of her property out of her power to deal with it in order to protect it from claims of creditors. While this purpose is not inconsistent with an intention to provide her heirs with an interest in the trust property, the only indication we have of decedent's intention, at the time the trust was created, as to the disposition of the trust property upon her death is the language used in the deed of trust; and this, as we have already pointed out, did not have the effect under Missouri law of creating an interest in her heirs.

We therefore hold that decedent was the only beneficiary under the trust created in effect by her in 1929, and consequently she had the power to revoke the trust under Missouri law. The value of the trust property is therefore includible in her estate under section 811(d)(2). *Vaccaro* v. *United States* (C. A. 5, 1945) 149 F. 2d 1014; *Howard* v. *United States* (C. A. 5, 1942) 125 F. 2d 986;

Estate of Felicie Gumbel Keiffer, 44 B. T. A. 1265 (1941), petition for review dismissed on motion, C. A. 5, October 14, 1942.

Petitioners point to the fact that the deed of trust made provision for keeping in trust any portion of the trust property passing to decedent's minor heirs during their minority, as an indication of an intention on decedent's part to create an interest in the trust property in her son at the time the trust was created. We fail to see in this provision an indication of the intention sought to be derived from it by petitioners. To us it indicates no more than that petitioner wanted to be certain that if any of the trust property should go to a minor heir, it would be properly cared for during minority. This is not to say that at the time the trust was created decedent wanted to put out of her power of disposition the interest in the trust property remaining after her death by then creating an interest in her son or heirs.

Another circumstance pointed to by petitioners as indicative of decedent's intention to provide her heirs with an interest in the trust property is her relinquishment of her power of appointment in 1943. This argument, it seems to us, avails petitioners nothing. The relinquishment was made in the hope of preventing the value of the trust property from being included in decedent's estate at death and thereby to save estate taxes. Even if we should conclude that at this time, in 1943, decedent intended that she should not during her lifetime have a power of disposition of the interest in the trust property remaining after her death, we should also have to conclude that in giving up her power of appointment decedent also gave up the power of revocation she had prior to that time, and that this was in contemplation of death within the meaning of section 811(d)(2), since, as we shall later point out, under our decisions a transfer motivated solely by a desire to avoid estate taxes is in contemplation of death.

Finally, petitioners contend that the Supreme Court's ruling in *Helvering* v. *Helmholz*, 296 U. S. 93 (1935) requires the conclusion here that the trust was not revocable by petitioners. In that case the trust instrument provided that the trust could be terminated upon delivery to the trustee of a written declaration, signed by all of the then beneficiaries, declaring the trust at an end. The Commissioner contended that this provision gave the decedent, who was one of the settlors of the trust and an income beneficiary of it during her life, a power to revoke or amend the trust which she could exercise with others within the meaning of section 302(d) of the Revenue Act of 1926. The Supreme Court denied the Commissioner's contention. It held that his

> argument overlooks the essential difference between a power to revoke, alter or amend, and a condition which the law imposes. The general rule is that all parties in interest may terminate the trust.[3] The clause in question added nothing to the rights which the law conferred. Congress cannot tax as a transfer intended to take effect in possession or enjoyment at the death of the settlor a trust created in a state whose law permits all the beneficiaries to terminate the trust.

[3] Restatement of the Law of Trusts, Secs. 337, 338. We are referred to no authority to the contrary in Wisconsin, the place of the transaction.

Applying *Helvering* v. *Helmholz* here petitioners argue that if we determine the trust was revocable by decedent under Missouri law, such a power of revocation is one conferred by law and hence not one that requires inclusion of the value of the trust property in decedent's estate. We think this contention is best answered by the following quotation from *Commissioner of Internal Revenue* v. *Allen*

(C. A. 3, 1939) 108 F. 2d 961, 965, certiorari denied 309 U. S. 680 (1940), explaining the meaning of the above holding in *Helvering* v. *Helmholz, supra.*

> The respondent misinterprets the meaning of the Helmholz case where the court said that the Government's "argument overlooks the essential difference between a power to revoke, alter, or amend, and a condition which the law imposes". [296 U. S. 93, 56 S. Ct. 70, 80 L. Ed. 76] What the court was there pointing out was that the power in the beneficiaries, as such, to revoke a trust was a legal right which they also enjoyed without any grant in the premises from the settlor. The power, therefore, could not be one reserved to the settler, as such, within the contemplation of Sec. 302(d) of the Estate Tax Act of 1926. Otherwise, Congress would be attempting to tax, as a part of a deceased settlor's estate, in States where beneficiaries have the legal right to terminate a trust, property with which the settlor had irrevocably parted in his lifetime, so far as any power, on his part as settlor, to terminate the trust was concerned. This, of course, Congress could not do without violating the Fifth Amendment of the Constitution, U. S. C. A.; and, an intent so to do was not to be imputed to Congress by adopting the construction of Sec. 302(d) of the Estate Tax Act of 1926 for which the Government was contending in the Helmholz case. The thing of importance in the Helmholz case was that the power of revocation there *rested with the beneficiaries and not with the settlor as such.* The ruling in the Poor case [*White* v. *Poor*, 296 U. S. 98 (1935)] so implies. In the latter case, the trustees did not have a power to revoke conferred by law as did the beneficiaries in the Helmholz case. The trustees' power to revoke

in the Poor case came from the trust indenture alone. Yet, the result in the Poor case was the same as in the Helmholz case. Neither the Helmholz case nor the Poor case distinguishes between a settlor's power to revoke when imposed by law and a settlor's like power when reserved by his trust indenture. [Underscoring supplied]

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[8] Restatement of the Law of Trusts, Secs. 337, 338.

An additional reason asserted by respondent for including the value of the trust property in decedent's estate is that decedent's release in 1943 of the power to name the ultimate beneficiaries of the trust property was in contemplation of death within the meaning of section 811 (d)(2). We have found as a fact that decedent's dominant motive in releasing her power of appointment was to save estate taxes. The circumstances of the release amply support this conclusion. By letter of May 27, 1943, decedent was advised by the St. Louis Union Trust Company, one of the trustees under the trust, that because of recent changes in the federal tax law her possession of a power of appointment could cause the value of the trust property to be included in her estate for estate tax purposes. Subsequently, by letter of June 23, 1943, decedent's husband was advised by a lawyer that decedent would have to give up the power of appointment to keep the value of the trust property from being included in her estate under the amendments to section 811(f) of the Internal Revenue Code of 1939 made by the Revenue Act of 1942, and acting on this advice she executed the release dated November 4, 1943.

We have previously held that a transfer motivated solely by a desire to avoid estate taxes was in contemplation of death. *Estate of Frank A. Vanderlip*, 3 T. C. 358 (1944) affd. (C. A. 2, 1946) 155 F. 2d 152, certiorari denied

329 U. S. 728 (1946). See also *Slifka* v. *Johnson* (C. A. 2, 1947) 161 F. 2d 467, certiorari denied 332 U. S. 758 (1947); *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, 50 F. Supp. 949 (D. C. W. D., Pa., 1943) affd. per curiam 137 F. 2d 653 (C. A. 3, 1943), certiorari denied 321 U. S. 764 (1944); *First Trust & Deposit Co.* v. *Shaughnessy* (C. A. 2, 1943) 134 F. 2d 940, certiorari denied 320 U. S. 744 (1943); *Farmers' Loan & Trust Co.* v. *Bowers* (C. A. 2, 1938) 98 F. 2d 794, certiorari denied 306 U. S. 648 (1938). The foregoing cases require the same result here. The fact that decedent thought her relinquishment of the power would result in nontaxability does not, of course, alter this result.[2] Nor does the fact found by us that decedent in 1943 was in good health and not particularly concerned with the prospect of death alter this result. The test is to be found in her motive, which must be of the sort that leads to testamentary disposition. *United States* v. *Wells*, 283 U. S. 102, 117 (1931).

A settlor's reservation of a power to change the ultimate beneficiaries of trust property is sufficient to cause the value of the property to be included in the settlor's estate upon death, as a power to alter or amend the transfer in trust under section 811(d)(2). *Bank of New York & Trust Co., Admr. (Est. of A. B. Hunt)*, 20 B. T. A. 677 (1930); *Laird* v. *Commissioner*, 29 B. T. A. 196 (1933), affirmed on other grounds (C. A. 3, 1935) 85 F. 2d 598,

[2] Section 403(d)(3) of the Revenue Act of 1942 (56 Stat. 944) and section 2(a) of the "Powers of Appointment Act of 1951" (65 Stat. 91) permit the tax-free release only of donated powers of appointment, not of reserved powers. See Conf. Report No. 2586, 77th Cong., 2d Sess., p. 71 (Amendment No. 418); H.R. Report No. 2333, 77th Cong., 2d Sess., p. 57 (defining a power of appointment); Senate Report No. 382, 82nd Cong., 1st Sess., p. 6 (specifically stating that the amendments made to section 811(f) by the "Powers of Appointment Act of 1951" do not limit the scope of section 811(a), (c), and (d)).

modified and remanded on other grounds on rehearing, 85 F. 2d 600. Cf. *Porter* v. *Commissioner*, 288 U. S. 436 (1936). (The foregoing cases involve section 302(d) of the Revenue Acts either of 1924 or 1926, whose wording, insofar as material here, is the same as section 811(d)(2), I. R. C. of 1939.) Where the settlor relinquishes this power in contemplation of death, section 811(d)(2) specifically requires the inclusion of the value of the trust property in his estate.

Petitioners in attempting to fit their case into the Supreme Court's holding in *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630 (1946), contend that decedent's purpose in releasing her power of appointment in 1943 was to accomplish what she thought she had done in making a new will in 1941 (in which she specifically refrained from exercising her power of appointment), that is, to make certain that her son receive the trust assets free of tax. We think the analogy is misplaced. *Allen* v. *Trust Co. of Georgia*, *supra*, involved the creation of a trust by decedent in 1925 to provide for his children, both of whom were then in need of funds. His purpose in placing the money in trust was to protect his children against any misadventures that might result in the loss of the money, since prior gifts had been lost in unsuccessful business ventures. Decedent retained a power to amend the trust, which he released in 1937 upon being advised that his retention of the power of amendment would cause the value of the trust property to be included in his estate. The Court held that decedent's release in 1937 was not in contemplation of death because in making the release he was merely doing what he had intended to do in 1925, which was "to make complete and absolute gifts to his children, freed of all claims, including taxes". (p. 636) The cases are analogous in so far as the decedent here was attempting to do in 1943 what she intended to do in 1941, but her intention in the latter year was simply to save estate taxes. The record

does not support a finding that decedent in 1941 intended to make a complete and absolute gift to her son.

The remaining question relates to the respondent's disallowance of part of the amount claimed for support of a dependent (decedent's husband) under section 812(b)(5) of the Internal Revenue Code of 1939. On the estate tax return $15,000 was claimed by decedent's estate, and this amount was increased by amendment to the petition to $18,000. Respondent in his notice of deficiency allowed $12,000. Section 812(b)(5)[3] provides that for purposes of the estate tax the value of the net estate shall be determined by deducting from the value of the gross estate amounts that are "reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the jurisdiction * * * under which the estate is being administered."

In our view petitioners have failed to show that under the circumstances here an amount in excess of $12,000 was reasonably necessary for the support of decedent's husband during the settlement of the estate. (Respondent does not question that decedent's husband was dependent on her for support, that the amount of $18,000 was actually expended, and that such payment was allowed under the laws of Connecticut.) As set forth in our findings of fact decedent's husband received pursuant to orders of a probate court of Connecticut payments of $1,000 a month as a support allowance for the period from the date of decedent's death, May 1949, until November 1950, a total of $18,000. In July 1949 two months after his wife's death, decedent's husband was paid a bequest of $10,000 as provided for in decedent's will. In addition, in November

[3] Section 812(b)(5) was repealed by section 502(c) of the Revenue Act of 1950 (64 Stat. 962). The change was effective with respect to estates of decedents dying after September 23, 1950, the date of the enactment of the Revenue Act of 1950.

1950 he received $4,000, representing payments of $1,000 a month from June through September 1950, under the residuary trust created by decedent's will. While it is apparent from the whole record here that decedent was well-to-do and that she and her husband enjoyed a high standard of living, petitioners have not demonstrated why, in light of the circumstances set out above, the additional $6,000 contended for was reasonably required for decedent's husband's support. Cf. *Mary M. Buck et al, Executors*, 25 B. T. A. 780 (1932), affd. on this point sub nom. *Buck* v. *Helvering* (C. A. 9, 1934) 73 F. 2d 760; *Estate of Charles C. Hauch*, 19 T. C. 65 (1952). The fact that the support payments amounting to $18,000 were authorized by the Connecticut Probate Court is not binding on us in our determination of whether such amounts were "reasonably required" within the meaning of a federal taxing statute. *Buck* v. *Helvering, supra; Estate of Charles C. Hauch, supra.*

Decisions will be entered under Rule 50.

Excerpt from Commissioner's Notices of Deficiency

(Rec. 90 [Docket No. 51124])
(Rec. 121 [Docket No. 51125])
(Rec. 149 [Docket No. 51130])

Explanation of Adjustments	Returned	Determined
Transfers During Decedent's Life		
Item 1	0.00	681,530.99

The release by the decedent on November 4, 1943 of her powers under the trust dated February 16, 1929 between Thomas J. Boland, as Grantor and St. Louis Union Trust Co., et al as Trustees, is included in the gross estate as a relinquishment in contemplation of death coming under the provisions of Sections 811(c) and (d) of the Internal Revenue Code.

Excerpt from Stipulation of Facts in Docket Nos. 51124, 51125, 51130

(Rec. 203-209)

SAME CAPTIONS.

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above-entitled petitioners, by their respective undersigned attorneys, that the following facts shall be taken as true, provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any such facts on the ground of immateriality or irrelevancy:

1. Mary Lois K. McIntosh died on May 21, 1949 at the age of 63 years 9 months. On August 21, 1950, her executors filed an estate tax return with the then collector of Internal Revenue for the district of Connecticut, showing a tax liability of $133,927.02.

Excerpt from Stipulation of Facts in Docket Nos. 51124, 51125, 51130

2. On February 16, 1929 Mary Lois K. McIntosh, then Mary Lois K. Perry, conveyed to Thomas J. Boland, an attorney in the office of Paul Bakewell, Jr., certain property (described in Exhibit 1 attached hereto), and Thomas J. Boland conveyed such property to the St. Louis Union Trust Company and Paul Bakewell as Trustees under a certain trust instrument, a copy of which is attached hereto and marked Exhibit 1. The trust is a "spendthrift trust" under the law of Missouri. A settlor could not under the law of Missouri create a spendthrift trust for his own benefit. Mr. Boland served as nominal settlor.

3. Said Paul Bakewell, Jr. resigned as one of said trustees by instrument dated May 27, 1929, and a photostatic copy of said instrument is attached hereto as Exhibit 2. Mary Lois K. McIntosh, on May 15, 1934, duly nominated and appointed Russell L. McIntosh, her husband, as successor individual co-trustee by instrument dated May 15, 1934, a photostatic copy of which is attached hereto as Exhibit 3.

4. On May 27, 1943, the St. Louis Union Trust Company advised Mary Lois K. McIntosh by letter that her powers under the trust instrument should be reviewed in light of changes in the Federal estate and gift tax laws contained in the 1942 Federal Revenue Act. A photostatic copy of said letter is attached hereto as Exhibit 4.

5. An exchange of correspondence between Mary Lois K. McIntosh and St. Louis Union Trust Company followed, and as a result the New York firm of McNamara & Seymour prepared a release of the power of appointment possessed by Mary Lois K. McIntosh, which release was executed on November 4, 1943. Attached hereto as Exhibit 5, is photostatic copy of letter from Mary Lois K. McIntosh, signed "Lois K. McIntosh" to the St. Louis Trust Company, dated June 1st; as Exhibit 6, photostatic copy of reply of St. Louis Union Trust Company to Mrs. Lois K. McIntosh

dated June 3, 1943; as Exhibit 7, photostatic copy of letter from the New York law firm of McNamara & Seymour to Russell L. McIntosh, dated June 23, 1943; and as Exhibit 8, photostatic copy of the release of the power of appointment executed by Mary Lois K. McIntosh on November 4, 1943.

6. The letter of St. Louis Union Trust Company to Mrs. Lois K. McIntosh dated May 27, 1943, was initiated by St. Louis Union Trust Company in accordance with their policy of reviewing all trust instruments and writing to all beneficiaries having a power of appointment under a will or trust indenture. Attached, as Exhibit 9, is a photostatic copy of the letter of St. Louis Union Trust Company to Pullman, Comley, Bradley & Reeves, dated May 11, 1954; as Exhibit 10, a copy of a letter of Pullman, Comley, Bradley & Reeves to St. Louis Union Trust Company dated October 8, 1954; and, as Exhibit 11, a copy of a letter of St. Louis Union Trust Company to Pullman, Comley, Bradley & Reeves, dated October 11, 1954.

15. If the trust created on February 16, 1929 is includible for Federal estate tax purposes in the gross estate of Mary Lois K. McIntosh, the sum of $681,530.99 represents the value at which such trust property should be included in her gross estate.

16. If the trust created on February 16, 1929 is includible for Federal estate tax purposes in the gross estate of Mary Lois K. McIntosh, the petitioners in Docket No. 51125, and the petitioner in Docket No. 51130, concede liability as transferees, under the provisions of section 827(b) and section 900 of the Internal Revenue Code of 1939, for the amount of any deficiency in estate tax redetermined by the Tax Court to be due in Docket No. 51124, not in excess of $681,530.99, plus statutory interest on such redetermined deficiency.

Exhibit 1. Attached to Stipulation of Facts

17. Attached hereto and marked Exhibit 19 is a copy of the will of Mary Lois K. McIntosh. Attached hereto and marked Exhibit 20 is a photostatic copy of the Federal estate tax return filed on behalf of the Estate of Mary Lois K. McIntosh.

(Signed) ARTHUR M. COMLEY
Counsel in Dockets Nos. 51124, 51125

(Signed) RAYMOND A. CARTER
Counsel in Docket No. 51130

(Signed) JOHN POTTS BARNES
John Potts Barnes
Chief Counsel
Internal Revenue Service

Exhibit 1, Attached to Stipulation of Facts

(Rec. 210-219)

THIS DEED, Made and entered into this 16th day of February, 1929, by and between THOMAS J. BOLAND, a single man, of the City of St. Louis, Missouri, party of the First Part, and the ST. LOUIS UNION TRUST COMPANY, a corporation under the laws of Missouri, and PAUL BAKEWELL, JR., of the City of St. Louis, Missouri, as Trustees, (which expression "Trustees" as used hereinafter in this instrument, shall mean the said St. Louis Union Trust Company and the said Paul Bakewell, Jr., and shall include the successor or successors of said St. Louis Union Trust Company and said Paul Bakewell, Jr., under this instrument, as such successors are appointed in the manner hereinafter provided), WITNESSETH:

That the said party of the First Part, for and in consideration of ONE HUNDRED DOLLARS ($100.00), to him paid by the Trustees, the receipt of which is hereby acknowledged, does, by these presents, Grant, Bargain and Sell, Convey and Confirm unto the said Trustees an undivided

one-sixth (1/6th) interest in and to the following described lots or parcels of real estate, situate, lying and being in the City of St. Louis and State of Missouri, together with any and all improvements thereon, to wit:

[Descriptions omitted.]

Also an undivided one-fourth (1/4th) interest in and to the following described real estate, situate, lying and being in the City of St. Louis, State of Missouri, to wit:

[Descriptions omitted.]

The above parcels of real estate are respectively subject to leases now of record. Also the following described personal property, to wit:

[Descriptions omitted.]

This conveyance is made to the said Trustees IN TRUST, HOWEVER, for the following uses and purposes: said trust shall continue for the sole use and benefit of Mary Lois K. Perry, now of New York City, New York, for and during her natural life, and during said trust the Trustees shall pay the taxes on said real estate and all proper charges and expenses in connection with the management and administration thereof. After the payment of such taxes and such proper charges and expenses, the Trustees hereunder shall pay the entire net income from the trust estate as hereby created in monthly installments of as nearly an equal amount as may be conveniently possible to the said Mary Lois K. Perry.

During the continuance of the trust hereby created, the Trustees shall have and hold the trust estate, and the beneficiary thereof, Mary Lois K. Perry, from time to time, shall enjoy the same subject to the following conditions, limitations, powers and discretions in addition to those hereinbefore specified, to wit:

Exhibit 1. Attached to Stipulation of Facts

The Trustees shall receive, manage and control the trust estate and the property thereof as the Trustees may deem best for the interests of the beneficiary; the Trustees, without accountability for loss, may retain as investments all real estate received in trust under this deed; the Trustees, in their discretion from time to time, may let, lease, bargain, sell, mortgage, exchange, grant and convey any real estate hereby conveyed at such prices and on such terms as they may see fit. The Trustees hereunder may, in the event of a sale of said real estate, or any part or portion thereof, reinvest the proceeds of any such sale or sales in other real estate or in notes secured by first mortgage or first deed of trust, or in bonds of the United States, or of any state thereof, or in bonds of any city, county or municipal subdivision of any state in the United States, or in notes or bonds of any corporation of any state in the United States, or in the stock of any corporation which the Trustees shall deem a safe and conservative investment for trust funds, and such right and power to sell, lease, exchange, grant and convey shall be a continuing right and power during the existence of the trust created by this instrument, and shall extend to all assets of the trust estate and may be exercised by the Trustees as often as they shall deem necessary. The Trustees shall, in their discretion, have power to incorporate the real estate hereby conveyed, and to accept and receive for the said real estate or any part or portion thereof, or any interest therein, stock in any corporation which may be formed for the purpose of acquiring the full and complete ownership and title to any parcel or parcels of real estate in which an undivided interest is conveyed by this instrument; it being the purpose of the last clause to make it possible for the Trustees hereunder to join with the other owners of undivided intrests in any parcel or parcels of real estate, in which an undivided interest is conveyed by this instru-

ment for the purpose of forming a corporation to hold title to said parcels of real estate, or any of them, in the event that such a plan or course should be deemed desirable by the owners of all undivided interests.

The Trustees shall, from time to time, collect the rents and profits of and from the real estate hereby conveyed, and in the event of any sale thereof, and the reinvestment of proceeds of such sale, shall collect the rent, interest, dividends or profits from any such investments made by the Trustees and shall disburse the net income as herein authorized and directed.

In the event that there shall come into the hands of the Trustees hereunder any stock in any corporation upon which distribution or disbursements of stock may be made in the manner or form of stock dividends, then all of such stock dividends that may be so received by the Trustees hereunder shall, by the Trustees hereunder, be regarded as income, and not as corpus, and any and all stock dividends shall be distributed and delivered to the beneficiary hereunder as income.

The beneficiary hereunder, Mary Lois K. Perry, shall not have power to sell, assign, pledge, encumber or anticipate any interest created by this instrument, whether that interest be in the income or the principal of the trust estate; nor shall the interest therein of the said beneficiary be liable for her debts, nor subject to any suit at law or equity, it being the purpose of this instrument to provide that no right to alienate or create a charge upon the income from the trust estate hereby created shall exist or vest in the beneficiary hereunder, Mary Lois K. Perry, until the said income shall have been actually paid over to her.

If any suit be filed, the purpose of which is to reach any interest of Mary Lois K. Perry in the trust estate, or to make same liable for her debts in any manner before the income therefrom shall have been actually transferred or

paid over to her, then, until any such suit shall have been finally determined, the right of the beneficiary hereunder, Mary Lois K. Perry, to any payment from the trust estate shall stand suspended and be unenforcible.

While any such suit is pending, however, the Trustees hereunder may, in their discretion, apply such portion of the income from the trust estate as they may see fit for the maintenance and support of the said Mary Lois K. Perry.

The right of Mary Lois K. Perry as beneficiary hereunder to receive the income from the trust estate created by this instrument shall be for her sole and separate use, and free and clear of and from any claim or right, interest or control by any husband of the said Mary Lois K. Perry.

On the death of the said Mary Lois K. Perry, the trust hereby created shall end, and the entire trust estate created by this instrument, together with any and all accumulated and undistributed income therefrom, shall go to such parties and under such terms and conditions as the said Mary Lois K. Perry, may, by her last will, direct. In the event that the said Mary Lois K. Perry shall die intestate, or should fail to exercise said power by her last will, then, on her death, the entire trust estate hereby created, together with any and all accumulated and undistributed income therefrom, shall go and pass to the then heirs at law of the said Mary Lois K. Parry, under the statutes of descent and distribution of the State of Missouri, free of any trust whatever, provided, however, that any portion or portions which shall pass to any heirs at law of the said Mary Lois K. Perry who are then minors, shall not pass to such minors directly, but the portions of any such minor heirs at law shall continue with the said Trustees in trust for them respectively until they respectively become of legal age, then, to be transferred and paid to them free of trust. During the continuance of any such trust for minors the Trustees shall pay or apply the net income

from such trust estate for the support, education and maintenance of such minor or minors.

During the continuance of any such trust for minors, the Trustees shall have the same duties and the same powers as are given them by this instrument with regard to the trust hereby created for the life of Mary Lois K. Perry.

On the death, resignation or incapacity of Paul Bakewell, Jr., as one of the Trustees under this instrument during the continuance of this trust, then the beneficiary hereunder, Mary Lois K. Perry, shall have the right and power to nominate and appoint a successor individual Trustee. Such nomination and appointment shall be made by the said Mary Lois K. Perry, by an instrument in writing, executed by her and filed for record in the office of the Recorder of Deeds in the City of St. Louis. On the death, resignation, or incapacity of any successor individual Trustee that may be nominated and appointed by the said Mary Lois K. Perry, the said Mary Lois K. Perry shall have the right to renominate and reappoint another successor individual Trustee, and such power and right in the said Mary Lois K. Perry to appoint successor individual Trustee shall continue and may be exercised by her as often as may be necessary to provide for a successor or successors of the individual Trustee hereinbefore named.

At any time or times during the continuance of the trust as hereby created, the beneficiary, Mary Lois K. Perry, in her sole discretion, shall have the right to appoint a successor or successors from time to time to the St. Louis Union Trust Company, as Co-Trustee under this instrument, providing such successor or successors so appointed by her be a Trust Company existing under the laws of Missouri, and located in the City of St. Louis, Missouri, or a National Bank located in the City of St. Louis, Missouri, and duly authorized to act in a fiduciary capacity. Such appointment or appointments shall be

evidenced by an instrument in writing executed by the said Mary Lois K. Perry which shall be served upon the Trustees hereunder, and a copy of which shall be filed in the office of the Recorder of Deeds of the City of St. Louis. Such power and right in the said Mary Lois K. Perry to appoint another Trust Company as Co-Trustee hereunder shall continue and may be exercised by her as often as may be necessary in her sole discretion.

The individual or individuals so appointed as successor Trustee under this instrument, and any Corporation so appointed as successor Trustee under this instrument, shall together exercise all the powers and rights herein conferred as if orginally appointed as Trustees under this instrument.

In Witness Whereof, the said party of the First Part has hereunto set his hand and seal, and the said St. Louis Union Trust Company, as an evidence of its acceptance of the trust herein created, has caused its name to be hereunto subscribed by its Vice-President, and its corporate seal affixed, attested by its Assistant Secretary, and the said Paul Bakewell, Jr., has hereunto set his hand and seal, all as of the day and year first above written.

(Signed) Thomas J. Boland

St. Louis Union Trust Company,

By (Signed) Geo. G. Chase
Vice-President.

Attested:

(Signed) Illegible
Asst Secretary.

(Signed) Paul Bakewell, Jr.

[Acknowledgments omitted.]

Exhibit 4, Attached to Stipulation of Facts

(Rec. 224)

O. K. FOR FILING √
FILING DEPT. √
INVESTMENT DEPT. .....
REAL ESTATE DEPT. .....
ACCOUNT .....

May 27, 1943

Mrs. Lois K. McIntosh,
c/o Tokeneke,
Darien, Connecticut.

Dear Mrs. McIntosh:

T. D. 7186
TRUSTEE U/C
THOMAS J. BOLAND

Under the terms of the above trust certain powers respecting the principal were given to you, which, because of changes in the Federal Estate and Gift Tax laws, contained in the 1942 Federal Revenue Act as subsequently interpreted by regulations of the Treasury Department, may cause all or part of the trust assets to be included for taxation in your own estate, or otherwise.

The Revenue Act provides that persons holding such powers may release them in whole or in part at any time prior to July 1, 1943, and thereby remove or reduce this possible tax liability.

We believe this matter is of such importance to you that you should promptly consult with your own attorney as to the effect of such changes in the law as they pertain to you and the trust and as to what, if anything, you should do with respect thereto.

With kindest regards, we remain

Yours very truly,

(Signed) S. C. DAVIS, JR.

SCD:FH

Exhibit 5, Attached to Stipulation of Facts

(Rec. 225-226)

Telephone
Darien 8-1718

Pentlands
Tokeneke
Darien, Connecticut

The St. Louis Union Trust Co.
Attention Mr. Samuel C. Davis Jr.

I

I am in receipt of your letter regarding the trust made with you some years ago. The situation of change of laws etc. has been brought to my attention. I am perfectly willing to give up all powers of determination and every other right that I may have except that I would still want my husband, Russell L. McIntosh to still act as co-trustee with all the powers invested in him as heretofore. If this meets the conditions necessary to protect me under the new law you may make such revisions as necessary, if you are so permitted under the law, thus relieving me of the necessity of employing counsel. If however you think it advisable to avail myself of independent advice as you have indicated in your letter would it be possible to indicate this to me without prejudicing yourselves under the laws which you are forced to operate.

Very truly

(Signed) Lois K. McIntosh

June the first

Exhibit 6, Attached to Stipulation of Facts

(Rec. 227)

Letterhead of
ST. LOUIS UNION TRUST COMPANY
ST. LOUIS, MO.
June 3, 1943

Mrs. Lois K. McIntosh
Pentlands
Tokeneke
Darien, Connecticut

Dear Mrs. McIntosh:

Re: T. D. 7186 CO-TRUSTEE
UNDER CONVEYANCE OF
THOMAS J. BOLAND

This will acknowledge receipt of your letter of June 1 stating that you are willing to release any powers which you may have under the above trust, with the exception of changing the situation concerning the duties of your husband as Co-trustee.

As you may know, trust companies are no longer permitted to practice law and therefore we cannot make any changes in our customers' instruments or wills. It was with this thought in mind, that we wrote you, feeling that you would undoubtedly want to take up the question of releasing any powers which you may have under the above instrument, with your atttorneys.

I am enclosing for your convenience a copy of this instrument which I thought you might want to discuss with your attorney, in case you did not have an extra copy available in your own files. I am sorry we cannot be of service to you in making any changes which you may decide on or which you and your counsel may decide as being

to your best interests however, we will be more than glad to cooperate with you in any matters which may arise at any time.

Very truly yours,

(Signed) S. C. Davis, Jr.

SCD:CMW

Exhibit 7, Attached to Stipulation of Facts

(Rec. 228-229)

[COPY]

(File Copy of letter to Russell L. McIntosh, dated June 23, 1943, on the letterhead of McNamara and Seymour, Attorneys, New York City)

June 23, 1943

Dear Russell:

I received the copy of the Deed of Trust and the letter to Lois from Mr. Davis, St. Louis Union Trust Company, June 3, 1943, and copy of Lois' Will, dated July 14, 1941.

I have examined the Trust Deed and the Will. It is clear that under the Internal Revenue Code, as amended by the Revenue Act of 1942, the trusteed property will be taxable as a part of her estate, whether or not the power of appointment be exercised by Lois, unless it has been released by her effectively before March 1, 1944.

The original time permitted for a release would expire July 1 next. But this has been extended by the new Current Tax Payment Act of 1943 to March 1, 1944. This amendment is quite specific, and provides that a Release of a Power of Appointment before March 1, 1944 shall not be deemed a transfer of property by the individual possessing such power.

Exhibit 7, Attached to Stipulation of Facts

The provision of Article Fifth of the Will, to the effect: "but specifically not including in this my Last Will and Testament any property over which I may have a power of appointment created by deed or Will"—is not sufficient to constitute a release of the power of appointment of which Lois is the donee under the Trust Deed. It is ineffective, for the reason that the Will does not come into effect until death; and as the Will may be revoked, the mere execution of the Will does not constitute a release.

Under the law as it is now, the position of the donee of a power of appointment is that if the power be exercised during life, a gift tax is incurred. If the power be exercised by Will, an estate or inheritance tax is incurred in respect of the property to which the power of appointment applies, as it is deemed included in the estate of the testator. But, more than this, the property covered by the power of appointment is deemed also included in the testator's estate, for estate or inheritance taxes in cases where the power of appointment is not exercised, and where the testator takes no action about it. In other words, inaction is not sufficient. There must be an express release to avoid the tax.

For the preparation of the Release, I will need a little more information about the Trust Deed as to the real property, if any, now left in the Trust and about the next of kin and heirs at law who would take the remainder of the trust estate if the power of appointment is not exercised, and some information about the Trustees. Hence, I would like to confer with you as soon as convenient. It will be well to arrange for the execution of the Release promptly, even though the pressure on the time limit now has been eased.

In form, the Release will be an instrument, which refers appropriately to the Trust Deed and the power of appointment, and recites the relinquishment and release of the power to all persons having an interest in the property.

in the event of the non-exercise of the power, and which covenants with all such persons and the Trustees not to exercise the power. The instrument should be executed under seal and in triplicate, one counterpart to be delivered to each Trustee, and also it should be recorded in the county or counties where any real property, which may now be held by the Trust, is located.

I might also mention that a review of the Will indicates the desirability of revising it, because a trust is established by it for the benefit of you and the son, with one-third of the remainder given to those appointed by the son's Will. This may result in a double taxation (through Lois' estate and the son's estate) of the one-third part.

Sincerely,

Mr. Russell L. McIntosh,
Pentlands,
Tokeneke,
Darien, Connecticut.

M:RDM.

Exhibit 8, Attached to Stipulation of Facts

(Rec. 230-232)

RELEASE OF POWER

WHEREAS, the undersigned, Lois K. McIntosh, formerly known as Mary Lois K. Perry, is the beneficiary of income for her life and the donee of a general testamentary power of appointment given to her by a certain irrevocable Deed of Trust dated February 16, 1929, made by Thomas J. Boland, of the City of St. Louis, Missouri, to Paul Bakewell, Jr. and St. Louis Union Trust Company, a Missouri banking corporation, as Trustees, which power is set forth in said Deed of Trust in the following language, to wit:

> "On the death of the said Mary Lois K. Perry the trust hereby created shall end, and the entire trust estate created by this instrument, together with any and all accumulated and undistributed income therefrom, shall go to such parties and under such terms and conditions as the said Mary Lois K. Perry may, by her last will, direct. In the event that the said Mary Lois K. Perry shall die intestate, or should fail to exercise said power by her last will, then, on her death, the entire trust estate hereby created, together with any and all accumulated and undistributed income therefrom, shall go and pass to the then heirs at law of the said Mary Lois K. Perry, under the statutes of descent and distribution of the State of Missouri, free of any trust whatever. * * *."

and

WHEREAS, by instrument dated May 27, 1929, the said Paul Bakewell, Jr. resigned as one of said Trustees and, pursuant to power in said Deed of Trust, the undersigned thereafter, by instrument dated May 15, 1934, duly nomi

Exhibit 8, Attached to Stipulation of Facts

nated and appointed Russell L. McIntosh as Successor Individual Co-trustee, and

WHEREAS, the said Russell L. McIntosh and St. Louis Union Trust Company are now acting as Trustees thereunder, and

WHEREAS, the undersigned is desirous of releasing and relinquishing the said power of appointment forever to, and in favor of, the persons who may be or become entitled to receive the property heretofore subject to the said power of appointment in the event that such power be not exercised,

NOW, THEREFORE, the undersigned does hereby, irrevocably and forever, release and relinquish all power which she now has, or at any time hereafter may have had, to direct, nominate, or appoint the parties to whom the Trust Estate created by the Deed of Trust dated February 16, 1929, made by Thomas J. Boland, and any and all accumulated and undistributed income therefrom, shall go upon the termination of the said Trust, or to impose any terms and conditions with respect to the final distribution of said Trust Estate, and

The undersigned does hereby covenant with Russell L. McIntosh and St. Louis Union Trust Company as Trustees of said Trust, for and in behalf of the heirs at law of the undersigned, under the statutes of descent and distribution of the State of Missouri, and with Eugene Kilpatrick Perry, the sole apparent heir at law of the undersigned under such statutes, that there is not now in existence any will or other testamentary document executed by her which purports to exercise the aforesaid power of appointment, and that she will not hereafter execute any such will or testamentary document.

Exhibit 8, Attached to Stipulation of Facts

IN WITNESS WHEREOF, the undersigned has hereunto set her hand and affixed her seal in quintuplicate at New York City, New York, this 4th day of November, 1943.

(Signed) LOIS K. McINTOSH (L.S.)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

On this 4th day of November, 1943, before me personally appeared LOIS K. McINTOSH, to me known to be the person described in, and who executed, the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in The City of New York, State of New York, the day and year first above written.

(Signed) BERTHA E. REINHOLD
Notary Public, Queens County
Queens Co. Clerk's No. 1911, Reg. No. 720
N. Y. Co. Clerk's No. 142, Reg. No. 4P81
Kings Co. Clerk's No. 127, Reg. No. 4091
Commission Expires March 30, 1944

Delivery of an executed counterpart of the foregoing Release to the undersigned is hereby acknowledged.

(Signed) RUSSELL L. McINTOSH &

ST. LOUIS UNION TRUST COMPANY
By: (Signed) J. P. SHEMWELL Assistant Trust Officer
As Trustees under Deed of Trust dated February 16, 1929, made by Thomas J. Boland.

(Signed) EUGENE KILPATRICK PERRY

Exhibit 9, Attached to Stipulation of Facts

(Rec. 233)

Letterhead of
ST. LOUIS UNION TRUST COMPANY
St. Louis 2, Missouri
May 11, 1954

Mr. Frederick Pope, Jr.
Pullman, Comley, Bradley & Reeves
First National Bank & Trust Company Building
886 Main Street
Bridegport 3, Connecticut

Dear Mr. Pope:

Re: Thomas J. Boland Trust for
Mary Lois K. McIntosh

In regard to our letter to Mrs. McIntosh under date of May 27th, 1943 concerning her power of appointment under the Thomas J. Boland trust indenture, we wish to report that at about that time we reviewed all of our trust instruments and wrote to all beneficiaries having a power of appointment under a will or trust indenture, and suggested that they consult with their attorneys as to whether or not they should release or limit the power or appointment.

Yours very truly,

s/ J. P. SHEMWELL
J. P. Shemwell

JPS/ef

Excerpts from Official Report of Proceedings before the Tax Court, June 21, 1955

* * * * * *

(Rec. 5-12)

THE COURT: The proceedings will be consolidated. The trial may proceed.

MR. McGOWAN: Your Honor, at this time respondent would like to file a written motion in each docket number incorporating an amendment to its answer in each docket number.

THE COURT: What is the purpose of the amendment?

MR. McGOWAN: Your Honor, the purpose of the amendment is to assert an additional and an alternative reason why a certain inter vivos trust created by the decedent, Mary Lois McIntosh, should be included in her gross estate for federal tax purposes.

The motion is not directed at increasing the deficiency. The motion is only directed at stating an additional reason why the action of the Commissioner as reflected in his deficiency notice is correct and should be sustained.

The deficiency notice says that "This trust created in 1929 is includable in the estate of the decedent, who died in 1949, because in 1943 she relinquished a testamentary power of appointment over this trust property; that she relinquished this testamentary power of appointment in contemplation of death."

That is the way the pleadings presented the case prior to this motion to amend.

Now, respondent's position is this, that there is an alternative basis for including that trust in the gross estate of Mary Lois McIntosh, and the reason is that Mary Lois McIntosh was in law and in fact the settlor of this trust.

The facts will show that on one day she transferred this property to a man named Boland as nominee, and the

same day Boland transferred the property in trust for Mary Lois McIntosh.

I think in fact there was no question that Mary Lois McIntosh was settlor of this trust.

In addition, respondent believes that on a close reading of the trust instrument, there is only one beneficiary of this trust, and that one beneficiary is Mary Lois McIntosh. I think the stipulation indicates that the sole reason why Mary Lois McIntosh used a dummy, you might say, to create this trust, was to avoid the well-established rule that a grantor cannot establish a spendthrift trust for herself, and this was a spendthrift trust.

Now, we have this picture, then—

THE COURT: Excuse me just a moment.

Is there any objection to the—

MR. CARTER: I do object, your Honor.

MR. McGOWAN: I am only explaining my reason for my motion, your Honor. However, I will cut it short.

THE COURT: You are simply giving an additional reason for the determination?

MR. McGOWAN: Yes, sir. Everything I am saying is only what respondent is—

THE COURT: Does this change the proof that you otherwise—

MR. CARTER: I should like to be heard in opposition to this motion, your Honor.

MR. McGOWAN: I am not quite through.

THE COURT: Let Mr. McGowan continue; then you may state your objection.

MR. McGOWAN: Respondent's position is that she was settlor and beneficiary; that there were no other beneficiarises under the trust. Furthermore, she had the power to remove the trustees at any time.

Respondent's position is that because she was the sole beneficiary under the trust of this trust property, by force

of law she had at all times the power to revoke this trust, at all times, up to the date of her death.

I think that is a well-established principle of trust law which is set out in, I think, Section 338 of the restatement, with numerous cases and annotations.

Respondent does not believe this imposes any burden at all, and I want to emphasize that to the Court in making this motion. We do not believe it does, because this argument is purely a legal argument. It is an argument that depends for force and effectiveness on interpreting the trust instrument. Respondent does not have to go beyond the four corners of the trust instrument plus saying she was the sole beneficiary of the trust.

For the reason it does not require any additional showing of facts, that it is purely legal argument, respondent asks the Court to grant this motion which I now offer the Court, together with the amendments.

THE COURT: All right.

MR. CARTER: If your Honor please, the petitioners respectfully object to the amendment of the pleadings at this time.

This decedent died in 1949. Here we are six years later and counsel for the government says that this point he is now raising is within the four corners of this trust instrument. They have had four years in which to raise this point.

It is prejudicial to petitioners' case to raise this point right at the last minute before trial. I think it is rather important to note that we were advised last Friday by Mr McGowan there would be an amendment or an application for amendment, and we asked on what grounds, and he said, "Well, we will tell you Monday."

Now, this case started out a long time ago, when the government's initial position upon the audit was that there was a gift tax involved here on the power of appointment.

and as we came down through the Appellate Staff it developed into a contemplation of death question. We are prepared to go to trial on that issue today. We are prepared to meet that issue, and we think the government is guilty of laches in moving at this late date to amend the pleadings.

Now, that is on the technical position. It seems to me that the only argument counsel for the government can make that a power was reserved to revoke this instrument is his argument that she could remove the trustees, and I should like to read to your Honor what right the grantor or the beneficiary of this trust had.

"On the death, resignation or incapacity of Paul Bakewell, Jr., as one of the trustees under this instrument and during the continuation of this trust then the beneficiary, Mrs. McIntosh, shall have the right and the power to appoint a substitute trustee."

She had no right to remove the individual trustee. She only had the right to appoint a substituted trustee in the event of the resignation, incapacity, or death of the individual trustee.

Now, as to the corporate trustee, your Honor, if the corporate trustee was out of office she had the right, the limited right to appoint a successor corporate trustee, being a bank incorporated to do business in the State of Missouri and located within the City of St. Louis.

We fail to see what the position of the government is on this point or what its substance is as to the power of Mrs. McIntosh to revoke this trust.

Upon the procedural point or the substantive point we ask that this motion be denied, your Honor.

MR. McGOWAN: Your Honor, I want to say this. First of all, I think Mr. Carter has gone into legal argument as to the substance behind this. I think that is properly a matter for motion. I think he has given the Court a very small portion of the trust instrument. Furthermore

THE COURT: I don't want to go into the merits of the additional reasons you want to present for amendment at this time. I mean, you are not asking for a continuance or additional time in which to meet the point raised by the motion?

MR. CARTER: If your Honor permits this pleading to be amended then I should like to reserve for the moment a request for continuance on the proof solely as to the amended pleadings.

I am prepared today to meet the issue which is in this case and has been in this case by the petition and the answer, and I request that we may be permitted to submit proof in that connection.

If there are to be additional issues brought into this case at the last second of this trial then I would like to reserve at this time until we have an opportunity to present proof whether or not a continuance will be requested on the amended pleading.

THE COURT: As I understand the additional point respondent wants to raise now, it is simply concerned with the interpretation of the trust agreement itself, which presumably will be before the Court, and I don't see that it would require additional proof, but I will grant the motion and you can file your amended answer, and if a reply is necessary I will give the petitioner time to file a reply.

* * * * * *

Testimony of RUSSELL L. CECIL, for petitioners.

Direct examination by Mr. Carter.

(Rec. 20-21)

Q. Dr. Cecil, your office address is 30 East 61st Street, New York City? A. 33.

Q. 33 East 61st Street, New York City, and you are qualified to practice medicine in the State of New York? A. Yes, sir.

Russell L. Cecil—for Petitioners—Direct

Q. Will you tell us, please, when you were admitted to practice; what degrees you hold and, in general, your experience, career and qualifications?

* * * * * *

(Rec. 21-28)

Q. When did you first meet Mrs. McIntosh? A. I first met Mrs. McIntosh on April 30, 1940.

Q. And thereafter, and until just prior to her death, did you continue to see her professionally? A. Yes.

Q. Doctor, at your first conference in April of 1940 or at any time thereafter did you obtain from Mrs. McIntosh information regarding her medical history prior to April, 1940? A. Yes. One always takes or gets a sort of review of what we call the past history of a patient's medical ailments, and that was done in her case.

Q. Was there anything in that prior record concerning a serious illness of Mrs. McIntosh that you know about? A. Well, there was—she had had mild symptoms of a nervous breakdown at the age of 25. It turned out to be an intoxication of some kind, auto-intoxication.

She had had at various times mild symptoms of high blood pressure, which she said showed itself in the form of a sort of tension or excitement, mental excitement, but nothing else of any great importance came out in the history, in the past history.

Q. What was the general condition of her health on April 30, 1940? A. She had a normal physical examination. Her weight was 144.

I state here (looking at document), that she was a healthy looking woman for her age, and her heart was normal in size.

She had a negative test, except for the blood pressure, which was elevated.

Q. What was the blood pressure reading there? A. At that time 190 over 120.

Q. Now, in 1940, shortly after you first met Mrs. McIntosh, she entered Doctor's Hospital, did she not? A. She did.

Q. And it was found that she had an abscess in the right middle lung area? A. That is correct.

Q. Will you tell us, please, about that infection, what was done to care for it, and regarding her recovery? A. She was admitted to the New York Hospital in June 1940 and discharged July 28th, 1940; diagnosis of lobar pneumonia complicated by lung abscess on right side.

She was, of course, quite ill, naturally, with this picture, and this was before the day of penicillin, so she was a pretty sick patient. However, she was treated with the sulphur drugs and in spite of the complicating abscess she made a complete recovery. She was discharged in very good condition and with no residual troubles.

Q. Would you say that her recovery was complete after that abscess, and after pneumonia? A. I think so. Let me just look at my notes a minute and see what the follow-up says here.

Following that June, 1940 illness I didn't see her. I wasn't taking care of her as a general practitioner. She came to me more or less for consultation from time to time.

There was a lapse in my history there from her convalescence in New York Hospital until May 26, 1943, when she came in again to have her blood pressure checked, and she was working at that time in the U.S.O. Canteen. That was in the midst of World War II.

Q. What was her blood pressure in May of 1943? A. 176 over 120.

Q. You saw her again in that same year '43, did you not, Doctor? A. I saw her again in June.

Q. What was her blood pressure at that time? A. At that time about the same, 180 over 120.

Q. Had there been any significant changes in her blood pressure from the time you first saw Mrs. McIntosh in April, 1940 until those two examinations in 1943? A. As a matter of fact, the pressure was a little lower in '43 than it was in '40 and, as I remarked here, in June, 1943 her hypertension was asymptomatic. What I mean by that, she had elevated blood pressure but she had no symptoms from it.

Q. Did you consider her blood pressure high for a person of her age and sex? A. Yes, it was definitely elevated. The blood pressure in a woman of 57 you would expect to be around 140, 145, maybe 150, but anything over that would be an elevated blood pressure.

However, every doctor knows that women tolerate blood pressure much better than men do and have less accidents from it.

Q. Did you consider her blood pressure to be so high that you prescribed any medicine or any medical treatment for it at that time? A. No. When she got a little feeling of tenseness, of being keyed up or unable to sleep, we would give her some tablets, phenobarbital, which, of course, is one of the most popular drugs in New York, next to aspirin.

Q. You did not prescribe any sort of diet for her which you normally prescribe for blood pressure patients? A. Not at that time.

Q. You next saw Mrs. McIntosh in May and June of 1944? A. That is correct.

Q. Was there anything in Mrs. McIntosh's demeanor or attitude which would have caused you to believe that in 1943 Mrs. McIntosh was apprehensive of death? A. No, I should say definitely not. She was very much of an extrovert, outward-looking, and not at all apprehensive about her health. She never seemed to have any fear or worry about illness or death, or anything of that kind. She was very much of an outgoing personality.

Q. In that period through 1943 did she ever appear to you to be despondent or depressed? A. No.

Q. Now, in addition to treating Mrs. McIntosh professionally, did you and Mrs. Cecil and Mr. and Mrs. McIntosh have social contacts? A. Yes, on several occasions.

Q. What were her interests? A. Her interests were—she was fond of social life in general. I don't think she went in in a big way for sports at that particular time, but she was very fond of entertaining her friends, seeing her friends, and she was fond of traveling, and things of that kind.

Q. You mentioned a moment ago that she was—was that a hostess at the U.S.O.? A. Yes.

Q. That was during this period? A. That was during the war. She was going once a week to the canteen of the U.S.O.

Q. What were some of her other activities, if you have any knowledge of them, Doctor? A. Well, I don't have any particular record of any special activities outside of her work in the service at that time.

Q. Do you know whether or not she traveled any during this period? A. Yes, she used to go to Florida in the winter, and she may have gone abroad, I don't recollect, but she certainly was leading, as far as I could see, quite a normal life.

Q. From your conversations with Mrs. McIntosh, Doctor, both professionally and socially, and your observations of her acts during the last approximately nine years of her life, do you have any opinion as to Mrs. McIntosh's attitude toward life and death? A. I should say she was a woman with remarkable optimism regarding life, and having no depression, as I can see, at any time.

For instance, I have a note here in December of '44, "Patient feeling awfully well, going to Florida January 4, closing up house at Darien," and she seemed to be—she

had a slight cough that she complained of, but that was nothing much to worry about.

I should say she was remarkably alert, a very active woman for her age, interested in everything, and quite capable of keeping up her end of the procession.

Q. Without any apprehension of death? A. Correct.

* * * * * *

(Rec. 28-29)

Q. Did you attend Mrs. McIntosh professionally at the date of her death? A. A general practitioner took care of her on the date of her death, called in an emergency. I went up to see her after she died.

Q. Do you have any opinion as to the cause of her death? A. I am quite morally certain that she died of a stroke, what is known as apoplexy, hemorrhage of the brain causing paralysis and death.

Q. Will you please check your records and tell us when you saw her last prior to the date of her death, and why she came to see you at that time? A. The last time I saw Mrs. McIntosh was October 19, 1948.

As a matter of fact, I didn't see Mrs. McIntosh on that date. I notice that the handwriting is that of my colleague, my associate doctor who works with me, but I did see her on October 18, 1948, which was the day before that, on which I see a note in my own handwriting. She had come in for an abrasion on her left knee. She had fallen, evidently, and skinned her knee, and we gave her a dressing to apply to the knee.

At that time her blood pressure was 180 over 140, and that was on October 18, 1948.

* * * * * *

Russell L. Cecil—for Petitioners—Cross

Cross-examination by Mr. McGowan.

(Rec. 29-34)

Q. Doctor, when did Mrs. McIntosh first come to see you? A. The first visit, April 30, 1940.

Q. April 30, 1940? A. Correct.

Q. Do you have a record of how regularly she visited you thereafter? A. How regularly she visited me?

Q. Yes. A. Well, I have to go through my notes. She was an irregular visitor: she didn't come in frequently. For instance, she came in April 30th; had a complete physical examination and check-up. She came in on May 14th of that spring.

Q. That same year? A. Yes; May 22nd—no, wait a minute—June 19, 1940; June 27, 1940. Then there is quite a lapse to May 26, 1943.

Q. May 26, 1943. How frequently did she visit you in '43? A. Well, I will give you the running dates. June 1, '43—

Q. Go ahead. Excuse me. A. May 10th, 1944. There was a lapse again of a year.

Q. There were two visits to you in '43, is that right? A. That is correct.

Q. Now, on her first visit to you I think you testified that she gave you a medical history on her first visit to you? A. Yes.

Q. And she indicated she did have some high blood pressure at that time, is that right? A. Yes.

Q. Now, does your record indicate of what long-standing this high blood pressure had been; when did it start? A. She, I might add, was referred to me by a mutual friend and not by a physician. A great many patients come to me from other doctors with a past history, but this lady came to me from a mutual friend.

This history, as I have it here verbatim, "Three weeks ago in Palm Beach suddenly had a fever of 103.5 and chill. Next morning right jaw was swollen. She consulted a dentist, who cut her gum, and she came right home and saw her own dentist, who thinks the trouble is in the socket of the wisdom tooth. She caught cold and coughed a week ago, but that is better now. She has had two irrigations—" that is colonic irrigations, I presume.

"Last year she reduced 22 pounds and has held to this weight on account of high blood pressure. The problem now is high blood pressure, which she has had since 1931."

Q. 1931? A. That was my figure.

Q. What year did this take place, this trouble with her tooth? At what time is that writing referring to? A. When I saw her April 30, 1940, and this had been going on for—she said she was in Palm Beach before she began to have trouble with her tooth. That was evidently something that cleared up pretty promptly, but she said the problem was really high blood pressure, which she had had since 1931.

Then I have down here, "The only way she feels it is a certain excitement, which is temporary."

Q. Now, do you have similar statements for these visits in '43? A. 1943, "Age, 57; patient comes in for check-up on blood pressure. Once—" Let's see, "three hours once a week she works in U. S. O. Canteen."

Now, the only symptom from her blood pressure is a buzzing in the ears. I don't know whether that was from the blood pressure, or whether it was from some other cause, but she thought it came from the blood pressure.

Q. Is that your total report for '43? A. That just includes the notes that day. Then follows some laboratory work. Would you like to have a report on the tests for blood and urine?

Q. No, I don't think so. What figure does it say about blood pressure? A. Blood pressure 176 over 120 on that day, May 26, 1943.

Q. Is there anything else about blood pressure on that report? A. No.

Q. That is the visit in May, '43, is that correct? A. That is right.

Q. How about the visit the following month? A. In June, '43?

Q. Yes. A. I said here "asymptomatic hypertension, moderate obesity, weight 150 dressed, blood pressure 180 over 120."

Q. Now, is blood pressure ordinarily accompanied by headache and dizziness, Doctor? A. It is more apt to produce dizziness than it is headache, but when it gets very bad it produces both, both dizziness and headache.

Q. And she complained, did she not, of headache and dizziness at various times to you? A. Not at that time. I think later on she did, when it became more elevated. That was quite a little later on.

Q. I beg your pardon? A. I said at this point, June 1st, that her hypertension was causing no symptoms. I said "asymptomatic," and I meant by that it was not giving any outward expression of symptoms.

Q. You testified you believe she died from a stroke, is that right? A. Yes, yes.

Q. Would her high blood pressure have contributed to that stroke? A. Oh, very much so.

* * * * * *

Testimony of RUSSELL L. McINTOSH, for petitioners.

Direct examination by Mr. Carter.

* * * * * *

(Rec. 34-37)

Q. * * * Will you give us, please, your birth date? A. May 4, 1875.

Q. You are, then, approximately 80 years old today, or now? A. I was 80 years old last 4th of May.

Q. In what year did you first meet Mrs. Perry? A. 1927.

Q. Shortly after that first meeting did you discuss with her, or did she ask your advice, regarding the handling of her financial affairs? A. Not shortly after. I didn't see her again for one year from the time I met her.

Q. That would be, then, approximately in 1928? A. The autumn of 1928.

Q. Did she then ask your advice regarding the handling of— A. Shortly after that she did.

Q. Will you please tell us the substance of that conversation, or what Mrs. McIntosh said to you? A. Well, it ran along for quite a period of days, which resulted from the fact that she had been sued by Mrs. Ward for $50,000 for alienation of her husband's affections.

At that time Mr. Perry said that she had better give her securities over to him. Her securities consisted not of real estate, but consisted of negotiable bonds and stocks sold on the New York Stock Exchange, and she gave the thing over to him.

Q. Did she later become apprehensive about his handling of those securities? A. Yes.

Q. Will you tell us, please, in substance, what she said about that? A. To start with, she tried to get her securities back. The suit against her for $50,000 was dropped; there was no evidence. But she tried to get her securities back, and he would not give them back to her, and that is where I first came in with relationship to her.

Q. She therefore asked you to help her get her securities back? A. She asked me, yes.

Q. At her instructions or suggestions did you retain an accountant firm to examine Mr. Perry's accounts? A. Well, very much later she engaged the accounting firm who were friends of hers, not mine.

Q. Do you remember the name of that accounting firm? A. A. H. Whan & Company.

Q. I show you an accountant's report prepared by A. H. Whan & Company, addressed to Mrs. Lois K. Perry—A. Lois K. Perry.

Q. Lois K. Perry, February 21, 1929, and ask you if this was an auditor's report given to Mrs. Perry auditing Mr. Perry's accounts? A. I think so.

MR. CARTER: I offer it in evidence.

MR. McGOWAN: I object, your Honor, because I don't see what possible relevance this has. If my brother can explain what relevance it has, maybe—

MR. CARTER: I will explain it if it is accepted in evidence. Will you take it subject to explanation?

MR. McGOWAN: May I ask—

MR. CARTER: As I indicated, I am going to prove that her husband mismanaged and misappropriated substantial funds, and this report is proof of Mrs. Perry's suspicion.

MR. McGOWAN: I will withdraw my objection.

THE COURT: Admitted.

THE CLERK: Petitioner's Exhibit 21.

* * * * * *

(Rec. 38-42)

Q. Did you learn at that time, Mr. McIntosh, whether or not there had been a substantial loss in the handling of Mrs. Perry's affairs by her husband? A. I never really knew it until I saw that report, but I had suspicions before that.

Q. That report confirmed your suspicions? A. Yes.

Q. And Mrs. Perry's suspicions? A. Yes.

Q. Do you know the approximate date that Mrs. Perry divorced Mr. Perry? A. Approximately—

Q. Approximately. A. No; I think she divorced him in February, 1939—

Q. Thirty— A. '39.

Q. When were you married, Mr. McIntosh? A. July 30, 1931.

Q. Now— A. Did I say '39? I meant to say '31.

Q. '31? A. Yes.

Q. Did Mrs. Perry, or after her marriage to you, did Mrs. McIntosh ever mention to you that she had transferred certain property to a Mr. Boland? A. Yes.

Q. And that thereafter Mr. Boland created a trust for her benefit? A. Yes.

Q. Did she tell you why that trust had been established? A. Yes.

Q. Will you tell us, please, what she said to you in this regard? A. She said to protect this property against herself and generally protect herself against the misapplication of her funds.

Q. By whom? A. Anybody.

Q. Did she specifically mention her husband in that connection? A. I think not. I think he was present when the trust was made.

Q. What appeared to you to be Mrs. Perry's health during this 1927-'28-'29 period? A. As far as I could see, she was perfectly well. She was rarely in bed. She had had migraine headaches previously, but never had one after our marriage.

She was moderate in her habits, drank moderately, ate moderately, watched her weight carefully.

She was very fond of parties and dancing, and during that period I don't recall over a day at a time that she ever was in bed.

Q. Did she ever mention to you the respective ages at which her parents had died? A. Yes.

Q. Do you recall what those ages were? A. Yes.

Q. Will you tell us, please? A. Each died at 72 years of age, about 10 years apart.

Q. Did Mrs. Perry say anything to you, or did you observe anything during this '27-'28-'29 period which would lead you to believe that she was fearful of death? A. Absolutely not.

Q. Did she think she was going to die before you? A. She didn't. She thought she was going to outlive me.

Q. How did you learn that? A. Well, I learned it from a double source. She went to a facial woman here in town on 57th Street, I think she was, and used to discuss things with this woman freely, and she discussed this and whether she would marry again after my decease.

Then she sent a friend of hers, Mrs. Wick, of Darien, to this woman for treatments, and this woman told Mrs. Wick. Mrs. Wick told me.

Q. Told you that she was going to outlive you? A. Yes.

Q. She was going to marry— A. Mrs. Wick told me this facial woman had told her after Mrs. McIntosh's statement.

Q. Now, you were married to Mrs. McIntosh on July 30, 1931? A. Yes.

Q. And you continued to live with her up until the date of her death in 1945. A. Yes.

Q. Will you tell us, please, generally what the condition of her health was during that period? A. Outside of the lung abscess which she had, I don't recall anything that amounted to anything. She was fearful of her weight. Whenever she got up to 150 pounds she dieted. I can't recall during that period that she was hardly ever in bed.

Q. Did she appear to be happily married to you? A. I think we were extraordinarily happy.

Q. Beginning around the years 1940 and '41, Mr. McIntosh, and continuing up to the date of her death, will you please tell us generally what her activities were, what

she did, what her interests in life were? A. Well, along that time we bought the apartment, or she did, at 1030 Fifth Avenue, and we lived there during the winter months. Subsequently we bought a country place at Silver Mine, Connecticut, and we stayed there most of the summer.

During the summer we usually took a trip abroad, or somewhere, and during the winter we almost always went to Florida for a period, and, well, I can't recall any interruptions in those things that we did.

Q. Did she ever appear to you to be despondent or depressed? A. No.

Q. Did she ever say anything to you which would lead you to believe she was fearful of death? A. No.

* * * * * * *

(Rec. 43-46)

Q. Do you recall the events which occurred on the day Mrs. McIntosh died? A. Yes.

Q. Will you tell us very briefly what your activities were that day? A. Well, we were invited to go down to the races by Mr. Paul Brown, and he called for us at our apartment, 1030 Fifth Avenue, at eleven o'clock in the morning.

We drove down to Belmont, and went in and had lunch. After lunch we went into his box. He had another woman with him whom we had not met before, but whom Mrs. McIntosh liked, and we played the races.

She bet on every race, $2 on the favorite to show, and I think she won $2.35 and was very pleased at the end of the day.

After the sixth race he brought us back home and left. I had a drink, and she had a Coca Cola. That must have been around 5:30.

We sat there and read the papers; it was Saturday afternoon, and we read the papers, and along towards six

o'clock she said, "Do you want cocktails as usual before dinner?" And I said, "Yes."

"Well," she said, "you are drinking too much, but I will order the cocktails."

So then she said, "I am going in to change my dress," which she did every night, not to evening clothes, but to another dress.

I sat there and finished my highball and read the papers some more, and for some unknown reason I got up. I was in the library, and I got up and walked into the hall, and I saw her standing there in her underwear and motioning to me. I went to her, and she said, "This gas is killing me," and I said, "Well, shall I call the doctor?"

She says, "Oh, no." So I gave her some bicarbonate of soda, and everything I could think of. She stuck her fingers down her throat, but nothing happened.

Finally I said, "Please let me get a doctor." She said, "All right."

I called Dr. Cecil, but he was out playing golf. Then I called a doctor, I don't know his name, who had an apartment on the ground floor of the apartment where we lived. He was a specialist in diabetes, but he came up and he took her pulse and temperature and heart, and he told me they were all right.

She was still going around the room. So then he said, "If you get a high colonic—"

First, he said, "I will give you a little jab upward to ease you," and he gave her an injection of—what it was I don't know, but he sent me out to buy a bottle of high colonic and Pluto.

When I got back he turned to her and asked her to take the Pluto. She didn't want to, but anyway, she took the Pluto, and he gave her the high colonic, and then she was gone.

Q. And that doctor's name was Dr. Allen? A. Yes.

Q. Had he ever treated Mrs. McIntosh before? A. No, no.

Wilfred P. Forrest—for Petitioners—Direct

Q. Do you remember how you retained the services or how you consulted Mr. McNamara? A. We had known him personally, socially, for years. We had been there many times to dinner, and they had been to our house. I knew he was associated with two or three banks in town; I knew his reputation was very high, and I didn't know of anybody with as high a reputation, in my opinion, as he had.

Q. Do you recall whether in 1943 he gave Mrs. McIntosh any advice regarding a power of appointment? A. Yes, he told her to relinquish her power of appointment.

Q. Did Mr. McNamara make any statement that you recall as to why she should exercise the release of the power of appointment? A. Yes. He said she would probably stand better with the Tax Board if she did that than if she didn't do it. That was his reason.

* * * * * *

Cross-examination by Mr. McGowan.

(Rec. 46)

Q. Mr. McIntosh, do you know of any other reason why she relinquished it other than saving taxes? A. What is that?

Q. Do you know of any other reason why Mrs. McIntosh gave up her power of appointment other than taxes? A. No, I don't.

Q. Other than the saving of taxes? A. No.

* * * * * *

Testimony of WILFRED P. FORREST, for petitioners.

Direct examination by Mr. Carter.

* * * * * *

(Rec. 47-48)

Q. In the year 1941 were you associated with the law firm of Cummings and Lockwood? A. Yes.

Wilfred P. Forrest—for Petitioners—Direct

Q. And were you in charge of the Darien office at that time? A. I was, yes.

Q. Do you recall Mr. and Mrs. McIntosh coming to see you in the year 1941? A. Yes.

Q. Did they present to you a letter from St. Louis Union Trust Company, St. Louis, Missouri? A. They did, yes.

Q. I show you an original of a letter addr ssed to Mrs. Lois K. McIntosh dated June 24, 1941, signed by Mr. Frazier, the trust officer, on the letterhead of St. Louis Union Trust Company, and ask you if that is the letter presented to you by Mr. and Mrs. McIntosh? A. This is the letter.

Q. Did they discuss this letter with you? A. They did, yes.

Q. Do you recall in general what this letter discusses? A. Yes. It was a letter expressing the opinion of the Trust Company about the exercise or non-exercise of the power of appointment.

MR. CARTER: I ask to have this letter marked in evidence.

MR. McGOWAN: May I see it, please?

(Document handed to counsel.)

MR. McGOWAN: No objection, your Honor.

THE COURT: It will be admitted.

THE CLERK: Petitioner's Exhibit No. 22 admitted.

* * * * * *

(Rec. 49-51)

Q. After receiving this letter from Mrs. McIntosh, did you consider the suggestion of the St. Louis Union Trust Company that she refrain from exercising her power of appointment? A. Yes, I did. I examined law concerning it.

Q. And did you advise Mrs. McIntosh in relation thereto? A. I did, yes.

Wilfred P. Forrest—for Petitioners—Cross

Q. Do you remember exactly or in general what your advice to her was? A. I examined the law first, and then I determined that the best thing for her was not to exercise the power of appointment.

I remember considering whether simply not to say so in the will at all or to specifically say that she was not exercising it, and I think I did the latter.

Q. Did you thereafter prepare a new testamentary instrument for her? A. I did, yes.

Q. I show you a conformed copy of an instrument dated July 14, 1941, and ask you if this is the instrument that was prepared under your supervision? A. Yes, it is. I prepared this will.

Q. It was signed in your office? A. Yes, sir.

Q. Does this instrument refer to a power of appointment which Mrs. McIntosh had? A. Yes. It specifically excludes it, as I remember it.

Q. The will specifically refrains from exercising the power of appointment? A. The will says "But specifically not including in my last will and testament any property over which I may have power of appointment created by deed or will."

MR. CARTER: I offer this in evidence, your Honor.
MR. MCGOWAN: No objection, your Honor.
THE COURT: It will be admitted.
THE CLERK: Petitioner's Exhibit No. 23 admitted.

* * * * * *

Cross-examination by Mr. McGowan.

(Rec. 52)

Q. Mr. Forrest, I believe you testified on direct that Mr. and Mrs. McIntosh came to you, when was it, 1940? A. 1941.

Glentworth B. Whiting—for Petitioners—Direct

Q. 1941. And I believe you said that you advised Mrs. McIntosh not to exercise her power of appointment, is that right? A. Yes, that is right.

Q. Now, did you give her an explanation as to why you were giving her that advice? A. I believe I did. I suppose I told her that tax-wise it was better for her not to exercise specifically the power.

Testimony of GLENTWORTH B. WHITING, for petitioners.

Direct examination by Mr. Carter.

* * * * * *

(Rec. 53-54)

Q. What was your business prior to your retirement? A. I was a trust man, Empire Trust Company, assistant secretary at the uptown office.

Q. While you were connected with the Empire Trust Company, did you meet Mrs. Perry or, after 1931, Mrs. McIntosh? A. Yes.

Q. Can you tell me approximately when you did meet, if you have any recollection, when you did meet, when you first met Mrs. Perry or Mrs. McIntosh? A. It was around the late '20's, or the early '30's. She came to the bank in 1928, I believe. It was around about that time.

Q. Do you remember whether Mrs. Perry or Mrs. McIntosh ever discussed with you the Boland trust? A. I am just trying to recall. She did, yes.

Q. Will you please give us, to the best of your recollection, the substance of the conversations that Mrs. Perry or Mrs. McIntosh had with you regarding the Boland trust? A. Well, my recollections are that she discussed the trouble she had just passed through and the pending divorce and the settlement.

Glentworth B. Whiting—for Petitioners—Direct

Q. The troubles she had passed through, you mean, with her husband? A. And the loss of money.

Q. Did she discuss with you specifically the loss incurred by her husband in the handling of her financial affairs? A. Yes. I don't know whether at the time I knew definitely how it was, but I just understood it as speculation with her funds.

Q. Did you know what kind of a trust this was, what kind of a trust the Boland trust was? A. I understood from the beginning that it was a spendthrift trust as a protection to her and her heirs.

Q. Did you understand that that was one of the reasons why she had set up the Boland trust? A. Yes.

Q. Were there any other reasons, in addition to the spendthrift provision? A. I don't recall any except that that was to protect against further dissipation of her funds for herself and her heirs.

* * * *

(Rec. 58-59)

Q. Do you recall, Mr. Whiting, Mr. McIntosh speaking to you regarding a firm of attorneys? A. Yes.

Q. Do you remember the name of that firm of attorneys? A. McNamara and Seymour.

Q. Do you remember generally what he said to you regarding those attorneys or what inquiry he made? A. He had learned they were one of our principal attorneys. He had met them up in the Metropolitan Club; at least, they were both members. He was thinking of using them: I think first it was about a will, and then when there was so much general discussion about this change in the tax law, taxing the exercise of a power of appointment—it was on everybody's tongues at the time—he also brought that in. Mr. McNamara was to handle—as I understood, as I recall, they were going to relinquish that power of

appointment and dispose of it, and he was going to use Mr. McNamara.

I might add that Mr. McNamara at one time when I was at lunch with him had told me about Mr. McIntosh. He didn't go into any detail, but we had just discussed Mr. McIntosh briefly.

Q. Do you know whether Mr. McNamara is still alive? A. No, he isn't.

Q. He is dead? A. He has been dead a few years; I believe in the late '40's.

* * * * * *

Testimony of JOHN P. SHEMWELL, for petitioners.

Direct examination by Mr. Carter.

* * * * * *

(Rec. 60-61)

Q. Were you with the St. Louis Trust Company in 1929? A. Yes.

Q. What is your position with the Trust Company today? A. Trust officer.

Q. Will you tell us, please, if you can remember, approximately when you first met Mrs. Perry, or Mrs. McIntosh? A. Oh, I would think it was some time around '34 or '35.

Q. Do you know whether or not Mrs. Perry inherited money while you were an officer or employed by the St. Louis Trust Company? A. Yes, sir.

Q. Will you please tell us from whom and approximately when she inherited that money? A. Well, she got it from the Liggett estate in which her mother had a life interest, and that was as of the date of her mother's death, which was August 10, 1928.

Q. Her mother's name was Dolly Kilpatrick? A. Dolly Liggett Kilpatrick.

John P. Shemwell—for Petitioners—Direct

Q. Do you know generally what that property consisted of? A. It consisted generally of an undivided interest in various parcels of downtown St. Louis real estate.

Q. Did it also include other securities? A. Some securities, yes.

* * * * * * *

(Rec. 62-63)

Q. Do you know a Thomas J. Boland? A. I have never met him.

Q. Do you know of a Mr. Boland? A. I know of him, yes.

Q. Do you know what his occupation or profession is? A. Yes, sir.

Q. Would you tell us, please? A. He is Probate Judge, St. Louis, at present.

Q. Formerly he was an attorney? A. Yes, sir, formerly an attorney.

Q. Do you know whose office he was in, say, in the late '20's and early '30's, who he was associated with? A. He was associated with Paul Bakewell, Jr.

Q. Do you know his approximate age today? A. Oh, I would say he is in his early 50's, between 50 and 55.

Q. In 1943, what position did S. C. Davis hold with the St. Louis Union Trust Company? A. Assistant trust officer.

Q. Do you know how long he had been with the Trust Company at that time? A. About six years.

Q. Were you the trust officer or was Mr. Davis the trust officer in charge of the Liggett trust? A. I have charge of the Liggett trust, and I had charge of them at that time.

Q. And you have charge of them today? A. Yes.

* * * * * * *

John P. Shemwell—for Petitioners—Direct

(Rec. 65-66)

Q. Was there some problem in 1943 which required the canvassing of all the trust accounts in your office, Mr. Shemwell? A. Yes.

Q. What was that problem? A. Well, it concerned powers of appointment, and the advisability of releasing or diminishing powers of appointment.

Q. The amendment of the Internal Revenue Code of 1942? A. That is right.

* * * * * *

(Rec. 68-69)

Q. Will you please tell us why it was this letter of May 27, 1943, was written by Mr. Davis rather than by you? A. Because Mr. Davis handles all accounts starting with A, B, and C.

Q. Let me ask you another leading question:

Did the Revenue Act of 1942 cause an exception to the general policy of funneling trust matters down to particular officers? A. No.

Q. It did not cause an exception? A. Well, we had our various accounts.

Q. Normally, would that letter in connection with the Boland trust have come down to you? A. Normally all correspondence in connection with the Boland trust would be handled by me, but this was a wholesale operation so it entailed the writing of a lot of letters, and it was initiated by the accounting department, to wit, all the detail work of getting together all the synoptic records and sending them down to the various trust officers.

Q. And, therefore, this letter of Mr. Davis's was written by Mr. Davis rather than by you? A. That is right.

Q. Was Mr. Davis at all familiar with the Boland account? A. No, sir.

John P. Shemwell—for Petitioners—Direct

Q. Can you tell me what records he would have looked at in writing this letter of May 27th, looked at or examined, in writing this letter of May 27, 1943? A. A copy of the trust deed.

Q. Would he also look at a copy of what your trust company entitled the "synoptic record"? A. Well, he may or may not: that is difficult to say.

* * * * * *

(Rec. 69-71)

Q. Do you have in your office and do the trust officers have access to cards which are entitled "synoptic record"? A. Yes, sir.

Q. Those cards contain a summary of the trust instruments themselves? A. That is right, a summary.

Q. And they are not upstairs some place, but right on the floor where the trust officers are? A. That is right.

Q. I show you a photostatic copy of the synoptic record of the Boland trust and ask you if you can identify that as being a copy of the synoptic records of your office? A. Yes, sir, that is a copy.

Q. What other records might Mr. Davis have looked at when he wrote this letter of May 27, 1943? A. Well, he looked at the trust instrument, and possibly at that card.

MR. CARTER: This card.

May I ask that this card be marked in evidence?

MR. McGOWAN: I have certainly never seen this. Your Honor, I object on the ground of relevancy. I don't see what possible relevance this has to the issue before the Court.

THE COURT: What is the purpose?

MR. CARTER: I should like to have your Honor look at it. It is a record that shows the trust of Thomas J. Boland; it sets forth and summarizes the

provisions of the trust. It makes no reference at all to Mrs. Perry having been the grantor or having anything to do with the setting up of that trust.

MR. McGOWAN: I reaffirm my objection on other grounds, that it is contrary to our stipulation. Our stipulation leaves the firm impression that the grantor of this trust was Mrs. McIntosh. I hope my brother is not trying to go contrary to that stipulation.

MR. CARTER: You, Mr. McGowan, for the government, have charged contemplation of death, the operation of mind. It is a very difficult burden to carry for a taxpayer.

The man that wrote this letter of May 27, 1943, thought from the records in the Trust Company file that Boland was the grantor of this trust and that Mrs. McIntosh had a donated power, and that is the reason I am offering this instrument in evidence.

MR. McGOWAN: If that is your reason, I have no objection to it. I have no objection at all, if that is the purpose of the offer.

THE COURT: Well, that is the stated purpose. The record will show that purpose and, subject to that condition, it will be admitted.

THE COURT: Petitioner's Exhibit No. 25 admitted.

* * * * * *

(Rec. 71-73)

Q. Mr. Shemwell, you have examined your file and you have found that this letter of May 27, 1943, initiated the discussion of the release of the power of appointment, have you not? A. Yes, sir.

Q. There was no inquiry prior to that time from Mrs. McIntosh as to what her rights were? A. Not that I know of.

John P. Shemwell—for Petitioners—Direct

Q. Mr. Shemwell, you have at my request today examined the trust indenture of February 16, 1929, specifically in relation to the powers of Mrs. McIntosh to substitute another corporate trustee? A. Yes, sir.

Q. Am I correct in my understanding that under the law of Missouri a trust company cannot resign without the approval of the Court?

MR. MCGOWAN: Objection, your Honor. I think this calls for a question of law from the witness.

THE COURT: Sustained.

MR. CARTER: Your Honor, I am doing the best I can in the issue that was raised this morning by this amended pleading. I haven't had time to bring lawyers from Missouri here to testify what the laws of Missouri are, and this man is a trust officer of the Union Trust Company, and has an opinion.

THE COURT: Well, the laws will be for me to interpret.

MR. CARTER: May I ask this witness his opinion as to whether it is the law or not?

THE COURT: No. The laws of the particular states are something this Court takes notice of and are subject to argument on brief. You can find cases and you can urge your slant on the law in brief.

By Mr. Carter.

Q. Mr. Shemwell, as trust officer and in charge of the Boland trust, what would you have done if you had received a letter from Mrs. McIntosh telling you that you were no longer a trustee? A. I would have referred the matter to our counsel, because I don't believe she could remove the St. Louis Union Trust Company as trustee.

* * * * * *

Amendment to Answer to Amended Petition in Docket No. 51124, filed at Hearing

(Rec. 197-198)

THE TAX COURT OF THE UNITED STATES

[Same Caption.]

Amendment to Answer to Amended Petition

Comes now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for further answer to the petition as amended, admits, denies and alleges as follows:

VII. As an alternative reason, to that asserted in the notice of deficiency and liability, for including in the gross estate of Mary Lois K. McIntosh the transfer in trust dated February 16, 1929, between Thomas J. Boland, as nominal grantor, and the St. Louis Union Trust Co. et al., as trustees, respondent alleges: that in law and in fact Mary Lois K. McIntosh was the settlor of this trust; that until her death on May 21, 1949 she was the sole beneficiary of the trust; that until her death she had the continuing power to remove trustees at will and to appoint new trustees; that by virtue of being the settlor and the sole beneficiary, and by virtue of her control over the trustees, she continued up to the date of her death to be the only person with any beneficial interest in the trust property; that by virtue of her sole and exclusive beneficial interest she retained at the date of her death the power to revoke the said trust, which power makes the trust includible in her gross estate under the provisions of section 811(d) of the Internal Revenue Code of 1939.

Amendment to Answer to Amended Petition in Docket No. 51124, Filed at Hearing

WHEREFORE, it is prayed that the relief sought be denied.

s/ JOHN POTTS BARNES JWE
JOHN POTTS BARNES,
Chief Counsel,
Internal Revenue Service

Of Counsel:

JOHN W. EDWARDS
Regional Counsel

JAMES R. McGOWAN
Attorney
Internal Revenue Service

NOTE: The amendments to the answers in Docket Nos. 51125 and 51130, differing only in the prayers for relief, appear respectively at pages 199-200 and 201-202 of the Record.

Exhibit 22, Introduced at Hearing

(Rec. 419)

Letterhead of
ST. LOUIS UNION TRUST COMPANY
St. Louis, Mo.

June 24, 1941

Mrs. Lois K. McIntosh
c/o Tokeneke
Darien, Connecticut

Dear Mrs. McIntosh:

As requested by Mr. McIntosh in his recent visit to St. Louis I have reviewed the correspondence and while it seems to me that Mr. Shemwell covered the matter very fully, I am glad to write you again endeavoring to answer the questions you seem to have in mind.

Under the terms of your trust fund with us you are not able to make any disposition of the income other than to receive it yourself. You cannot make a valid assignment of this income to your son, or in fact to any one, as it appears from the terms of this trust that the intention was to be certain that you personally receive the income produced by this trust fund. You do have the right to dispose of this fund in your will but from a tax standpoint it would seem desirable, if it is your desire that your son have this property, that you do not exercise this right.

You should, of course, have a will disposing of the property that you have other than that which is contained in this trust estate. The federal tax authorities under present practice tax the exercise of a power of disposition the same as if you owned the property if the power of disposition is exercised. If this power to dispose of the trust property is not exercised and this property is allowed to go to your son under the trust agreement, there would be a

Exhibit 22, Introduced at Hearing

definite tax advantage. This does not mean that you shouldn't make a will. We strongly recommend that you have your attorney draw your will and advise you on these matters as we cannot undertake to give legal advice, and we would suggest that in the drafting of your will the tax situation be given full consideration.

I hope I have given you the information you desire and regret that you were not able to come to St. Louis as it, of course, is much easier to make matters clear to you in a personal talk rather than in a letter.

Yours very truly,

(Signed) W. H. FRAZIER
TRUST OFFICER

WGF:FH

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 625

ESTATE OF MARY LOIS K. MCINTOSH, deceased, RUSSELL L. MCINTOSH and EMPIRE TRUST COMPANY, Executors, et al.,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT M. BENJAMIN,
Counsel for Petitioners,
1 East 44th Street,
New York 17, N. Y.

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Internal Revenue Code of 1939:	
Section 811(d)(2)	2, 4
Section 811(f)	4
Revenue Act of 1942:	
Section 403(a)	4, 5, 6, 7, 11
Section 403(d)(3)	4
Section 452(c)	6

PAGE

Public Law 68, 78th Cong., 1st Sess. (Current Tax Payment Act of 1943) 4, 6, 11

Act of September 23, 1950, Section 501(a) 2, 12-14

Regulation:

Treasury Regulations 105 (under Internal Revenue Code of 1939), Section 81.16 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

ESTATE OF MARY LOIS K. McINTOSH, deceased, RUSSELL L. McINTOSH and EMPIRE TRUST COMPANY, Executors, et al.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in the above-entitled cases on August 30, 1957.

Opinions Below

The findings of fact and opinion of the Tax Court of the United States (6a-27a)[1] are reported in 25 T.C. 794.

[1] References so numbered are to the pages so numbered of the Appendix to Brief for Petitioners in the Court of Appeals, filed herewith.

The opinion of the Court of Appeals (Appendix A, *infra*, pages 15-22) is reported in 248 F. 2d 181.

Jurisdiction

The judgments of the Court of Appeals (Appendix B, *infra*, pages 23-26) were entered on August 30, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Whether on the record in the Tax Court of the United States that court was justified in deciding that the relinquishment by Decedent in 1943 of a power to appoint by will the corpus of an *inter vivos* trust was "in contemplation of . . . death" within the meaning of Section 811(d)(2) of the Internal Revenue Code of 1939.

Whether, as the Second Circuit has held, a supportable finding that the dominant motive for a transfer was the saving of estate taxes is, without more, sufficient basis for holding that the transfer was "in contemplation of death".

Whether the Act of September 23, 1950, Section 501(a), 64 Stat. 962, is properly to be taken into account in answering the questions previously stated in the estates of persons dying prior to the effective date of that Act.

Statutes Involved

Section 811(d)(2) of the Internal Revenue Code of 1939 is printed in Appendix C, *infra*, page 27.

Section 501(a) of the Act of September 23, 1950, is printed in Appendix C, *infra*, pages 27-28.

Statement

This petition relates to three proceedings, all involving the same issues as to a single estate tax. The Petitioner in the first proceeding is the Estate of Mary Lois K. McIntosh, deceased. The Petitioners in the second and third proceedings are transferees of the trust assets on Decedent's death, the Petitioners in the second proceeding being the trustees of the *inter vivos* trust, and the Petitioner in the third proceeding being Decedent's son, the transferee of the trust assets under the terms of the trust.

The transferees having conceded transferee liability if the assets of the trust are includible in Decedent's gross estate for estate tax purposes (30a), the three petitions in the Tax Court were consolidated for hearing and decision there. The three petitions to review the decisions of the Tax Court were consolidated for briefing and hearing in the Court of Appeals.

Decedent died on May 21, 1949, at the age of 63 years and 9 months (28a).

In 1928 Decedent inherited, on the death of her mother, property in which her mother had had a life estate, consisting of an undivided interest in various parcels of downtown St. Louis real estate and some securities (72a, 73a). Being worried by her then husband's recent management of certain other property of hers, which had resulted in a substantial loss, and for the protection of her property for herself and her heirs, she arranged for the creation of a trust of the property recently inherited by her (7a, 61a-62a, 70a-71a).

This was accomplished by Decedent's conveying the property to Thomas J. Boland, an attorney in the office of Paul Bakewell, Jr., and Boland's conveying the property

on the same day to St. Louis Union Trust Company and Paul Bakewell, Jr., as trustees under a trust deed, Exhibit 1, 31a-37a (29a). The trust was created as a spendthrift trust (8a). The trust deed provided for the distribution of income to Decedent during her life (32a), and provided further that on Decedent's death the principal should go to such persons and under such terms and conditions as Decedent might by her last will direct (35a) with a gift over to Decedent's heirs in default of her exercise of such power by her last will (35a-36a).

By Section 403(a) of the Revenue Act of 1942 (56 Stat. 942), Section 811(f) of the Internal Revenue Code of 1939 was amended to provide for inclusion in the gross taxable estate of unexercised[2] (as well as exercised) general powers of appointment, and by Section 403(d)(3) of the 1942 Act (56 Stat. 944) it was further provided that this amendment of Section 811(f) should not apply to general powers of appointment released before January 1, 1943.[3]

Decedent released her power of appointment under the trust deed on November 4, 1943. It was this release of power which the Tax Court, affirmed by the Court of Appeals, held ground for inclusion of the trust assets in the Decedent's gross taxable estate under Section 811(d)(2) of the Internal Revenue Code of 1939. We state the background:

Upon the enactment of the Revenue Act of 1942, the St. Louis Union Trust Company adopted a policy of writ-

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[2] In 1941 Decedent had executed a will specifically excluding any property over which she had a power of appointment (69a).

[3] The date before which general powers might be so released was extended from time to time by later legislation. The second such extension, to March 1, 1944, was by Public Law 68, 78th Cong., 1st Sess.

The relevant portions of Section 403 of the Revenue Act of 1942 are printed in Appendix C, *infra*, pages 28-29.

ing to all beneficiaries having a power of appointment under a will or trust indenture (30a). Pursuant to this policy the Trust Company wrote Decedent on May 27, 1943, at Darien, Connecticut, where she then lived, referring to the Boland trust and to the 1942 Act and advising her to consult her attorney (Exh. 4, 38a).

Decedent replied by letter of June 1, 1943 (Exh. 5, 39a):

> "I am in receipt of your letter regarding the trust I made with you some years ago. The situation of change of laws etc. has been brought to my attention. I am perfectly willing to give up all powers of determination and every other right that I may have except that I would still want my husband, Russell L. McIntosh to still act as co-trustee [4] with all the powers invested in him as heretofore. If this meets the conditions necessary to protect me under the new law you may make such revisions as necessary, if you are so permitted under the law, thus relieving me of the necessity of employing counsel. If however you think it advisable to avail myself of independent advice as you have indicated in your letter would it be possible to indicate this to me . . ."

The Trust Company replied by letter of June 3, 1943 (Exh. 6, 40a-41a), repeating its advice that Decedent consult her attorney.

Decedent's husband thereupon in her behalf consulted Mr. McNamara of the New York City law firm of McNamara & Seymour (67a); and on June 23, 1943, Mr. McNamara wrote him in part as follows (Exh. 7, 41a-43a):

> "I received the copy of the Deed of Trust and the letter to Lois from Mr. Davis, St. Louis Union Trust Company, June 3, 1943, and copy of Lois' Will, dated July 14, 1941.

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[4] Decedent had married Russell L. McIntosh in 1931 (62a-63a), and he had been appointed in 1934 successor individual trustee to succeed Paul Bakewell, Jr. (11a, 36a).

"I have examined the Trust Deed and the Will. It is clear that under the Internal Revenue Code, as amended by the Revenue Act of 1942, the trusteed property will be taxable as a part of her estate, whether or not the power of appointment be exercised by Lois, unless it has been released by her effectively before March 1, 1944.

"The original time permitted for a release would expire July 1 next. But this has been extended by the new Current Tax Payment Act of 1943 to March 1, 1944. This amendment is quite specific, and provides that a Release of a Power of Appointment before March 1, 1944 shall not be deemed a transfer of property by the individual possessing such power.[5]

"The provision of Article Fifth of the Will, to the effect: 'but specifically not including in this my Last Will and Testament any property over which I may have a power of appointment created by deed or Will'—is not sufficient to constitute a release of the power of appointment of which Lois is the donee under the Trust Deed. . . .

"Under the law as it is now, the position of the donee of a power of appointment is that if the power be exercised during life, a gift tax is incurred. If the power be exercised by Will, an estate or inheritance tax is incurred in respect of the property to which the power of appointment applies, as it is deemed included in the estate of the testator. But, more than this, the property covered by the power of appointment is deemed also included in the testator's estate, for estate or inheritance taxes in cases where the power of appointment is not exercised, and where the testator takes no action about it. In other words, inaction is not sufficient. There must be an express release to avoid the tax. . . ."

Thereupon the firm of McNamara & Seymour prepared the release of Decedent's power of appointment (Exh. 8,

[5] The reference is to § 10 of the Act, amending Section 452(c) of the Revenue Act of 1942 with respect to gift taxes.

44a-46a) which she executed on November 4, 1943 (29a-30a).

Petitioners conceded below that on the present issue Decedent's power of appointment is to be deemed a reserved power rather than a donated power, and that the Tax Court was right in holding that the provisions of Section 403 of the Revenue Act of 1942 referred to above were therefore not applicable (see the opinion of the Tax Court, 24a, fn. 2). The advice given to Decedent in that regard was therefore mistaken, but honestly mistaken since neither Mr. McNamara nor the officer of the Trust Company who communicated with Decedent (74a) was familiar with the background of the "Boland trust" and neither had reason to know that the power would be treated for tax purposes as a reserved power.

The Tax Court found (14a):

> ". . . At the time she executed the release of power of appointment decedent was in good physical condition for a woman of her age, and she had no particular concern about dying."

This finding is supported, and indeed required, by the evidence (52a-60a, 64a-66a).

Reasons for Granting the Writ

This case presents an opportunity for much-needed development by this Court of an important question of federal law,—the proper application of the "contemplation of death" provisions of the estate tax statutes. That question was extensively dealt with in *United States* v. *Wells*, 283 U. S. 102 (1931). The decision below, which we believe to be in conflict with the rationale of that decision of this Court, at least reveals one basic aspect of the general question which is still to be settled by this Court (and which, we submit, was wrongly decided below).

The essence of the decision of the Second Circuit in this case is in the following paragraph of its opinion (Appendix A, *infra*, page 21):

> "This brings us to the final question, is the finding that the decedent relinquished the power in contemplation of her death a proper one upon this record? Although conceding that when she made the release decedent was in good physical condition and had no particular concern about dying, the court found that her purpose in releasing the power was to save estate taxes,—this was her 'dominant motive.' The evidence sufficiently sustains that finding. We see no basis on which it could be held to be clearly erroneous. This court has sustained a holding that transfers were made in contemplation of death when their preponderant motive was avoidance of estate taxes. *Slifka* v. *Johnson*, 2 Cir., 161 F. 2d 467, following *Vanderlip* v. *Commissioner*, 2 Cir., 155 F. 2d 152. The record abundantly justified a finding that 'the thought of death [was] the impelling cause' of the release.[4]"
>
> "[4] The quoted language is from *United States* v. *Wells*, 283 U. S. 102, 118."

The rationale of this paragraph is that a supportable finding that the saving of estate taxes is the dominant motive for a transaction is, without more, ground for holding that the transaction was in contemplation of death.

This is a doctrine developed especially in the Second Circuit (see, *e.g.*, *Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794 [1938], cert. den. 306 U. S. 648 [1939], and *Vanderlip* v. *Commissioner*, 155 F. 2d 152 [1946], cert. den. 329 U. S. 728 [1946], cited in the above quotation).[6] It has not yet been adopted by this Court (*cf. Allen* v. *Trust Company of Georgia*, 326 U. S. 630 [1946], discussed at page 12, *infra*).

[6] The doctrine has been accepted in other circuits (*e.g.*, *Rickenberg* v. *Commissioner*, 177 F. 2d 114 [9 Cir., 1949], cert. den. 338 U. S. 949 [1950]).

The doctrine is one which should be reviewed and, we submit, rejected by this Court. *Vanderlip* v. *Commissioner*, *supra*, relied in part on *United States* v. *Wells* (155 F. 2d at 154):

> ". . . United States v. Wells, 283 U. S. 102, 51 S. Ct. 446, 75 L. Ed. 867, remains the controlling authority. In the words of Hughes, C. J., 283 U. S. at page 117, 51 S. Ct. at page 451,—'the dominant purpose is to reach substitutes for testamentary dispositions,' and 'the differentiating factor must be found in the transferor's motive. . . .'"

To be properly understood, this portion of the *Wells* opinion must be quoted more fully (283 U. S. at 116-117):

> ". . . The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Milliken* v. *United States*, *ante*, p. 15. As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. . . ."

The sentence last quoted speaks of a motive "of the sort which leads to testamentary disposition". A motive to save estate taxes cannot be so described. The distinction is recognized by the Treasury itself in Regulation 105 promulgated under the Internal Revenue Code of 1939, Section 81.16, cited below by the Commissioner:

> ". . . A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, *or* as a substitute for a testamentary disposition of the property, *or* for any other motive associated with death. . . ." (italics ours)

This Court, in *Wells*, was speaking not of a motive to save estate taxes but of a motive for making a *transfer* in the nature of a testamentary disposition, a transfer the impelling cause of which is "the thought of death". This Court wrote:

> "... It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive . . ." (283 U. S. at 115)
>
> "As the test, despite varying circumstances, is always to be found in motive, it cannot be said that the determinative motive is lacking merely because of the absence of a consciousness that death is imminent. It is contemplation of death, not necessarily contemplation of imminent death, to which the statute refers. It is conceivable that the idea of death may possess the mind so as to furnish a controlling motive for the disposition of property, although death is not thought to be close at hand. Old age may give premonitions and promptings independent of mortal disease. Yet age in itself cannot be regarded as furnishing a decisive test, for sound health and purposes associated with life, rather than with death, may motivate the transfer. *The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer*, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is 'near at hand.' " (283 U. S. at 117-118; italics ours)

The present case raises the basic question, being a case in which the *Wells* doctrine and the Second Circuit doctrine must reach opposite results. Under Decedent's 1941 will, which refrained from exercising the power of appointment, the trust assets would at her death go under the terms of the trust deed to her son Eugene Kilpatrick Perry. Under the relinquishment of power of November

4, 1943, the trust assets went to him in the same way. There was thus no change, by the relinquishment of the power, in the contemplated disposition of the trust assets at Decedent's death.

It is indisputable also, on this record, that (except under the Second Circuit doctrine that a motive to save estate taxes is sufficient in itself) Decedent's relinquishment of her power of appointment was not motivated by "the thought of death". A holding on this record that such was her motive would wholly distort the evidence. The Tax Court itself found that at the time she executed the release Decedent was in good physical condition for a woman of her age and had no particular concern about dying (page 7, *supra*). Decedent was told, in the letters that she received in May and June of 1943, that her release of her power of appointment would avoid an estate tax newly imposed by the Revenue Act of 1942. She was told also that what she did was in conformity with tax statutes currently enacted, and she would naturally have regarded the enactment of those statutes as an official invitation to do what she did. She was told in the letter from Mr. McNamara that the Current Tax Payment Act of 1943 provided that such a release should not be deemed a transfer of property by the individual possessing such a power; understanding from this that she was not making any transfer, Decedent could not have made a transfer "in contemplation of death". To say that in all these circumstances the "thought of death" was the "controlling motive" or "impelling cause" of her execution of the release of power would be to ignore wholly the real course of her thought.[7]

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[7] We assume for purposes of this petition the correctness of the Second Circuit's conclusion and the Tax Court's finding that Decedent's "dominant motive" in relinquishing the power was the saving of estate taxes. If the writ is granted, we should argue that the circumstances recited in the text challenge that holding also.

Allen v. *Trust Company of Georgia, supra*, 326 U. S. 630, is consistent with Petitioners' position that a dominant motive to save estate taxes cannot, without more, be ground for holding that the transaction was in contemplation of death.[8] There the decedent had created *inter vivos* trusts for his children, retaining a power to amend with the consent of the trustee and beneficiary. Upon being advised, following the decision of this Court in *Helvering* v. *City Bank Farmers Trust Company*, 296 U. S. 85, that the gifts remained a part of his estate for estate tax purposes, the decedent executed an instrument renouncing the power to amend the trusts. "This was done", as this Court stated, "so that the trusts would not be a part of his estate for estate tax purposes" (326 U. S. at 633). This Court upheld the decisions below that there was no gift in contemplation of death because the power was released "to accomplish the purpose which [the decedent] originally had, but which he later discovered had not been achieved", "to meet the necessities of his children by giving them property, freed of all claims, tax or otherwise" (326 U. S. at 636). This Court concluded its opinion with the statement that the decedent's "desire to make adequate provision for [his children] remained the dominant motive, or so the triers of fact could properly find" (326 U. S. at 637); but it remains true that the *only* difference between the provision that the decedent had already made for his children and the provision made for them by his renouncing of the power to amend was the difference in estate taxes.

As an additional reason for granting the writ, we believe it to be important that this Court determine the relevance of the Act of September 23, 1950, Section 501(a),

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[8] We do not argue, for the purposes of this petition, the factual resemblance of this case to the *Allen* case, which the Tax Court, though distinguishing the cases, itself recognized (25a).

64 Stat. 962, to the proper application of the "contemplation of death" provisions of the estate tax statutes. That Act provides as to the estates of persons dying thereafter that no transfer or relinquishment of a power made more than three years prior to death shall be held to have been made in contemplation of death, but that a transfer or relinquishment of a power made within the three years "shall, unless shown to the contrary, be deemed to have been made in contemplation of death . . .". We urge that, whether or not a decedent died before its effective date, the Act has an important bearing on the issue raised by this case.

This enactment, we suggest, can be rationally read only as evidencing a basic limitation of the meaning of "contemplation of death" to instances where death is, if not "thought to be close at hand", at least a matter of particular concern in relation to a decedent's age and state of health, this being the only aspect of "contemplation of death" to which the three-year period is logically relevant. At the least, we suggest, this Court should be slow to permit a finding of "contemplation of death" on other grounds, *e.g.*, on the motive-to-avoid-estate-tax ground, which take no account of the period intervening between the transaction and death.

This Court will, we believe, take judicial notice of the wide extension in recent years of the study and practice of "estate planning", which is directed among other things to the arrangement of a client's affairs by the use of insurance, *inter vivos* trusts, and testamentary provisions so as to take advantage of the opportunities given by the statutes to minimize the diminution of one's property by estate taxes. Suppose that a young man in perfect health, and with no "particular concern" about death, adopts an estate plan motivated solely by advice directed to the saving of estate taxes, and is, unlike his contemporaries,

killed within three years in a plane accident. It would, we submit, be contrary to the inherent rationale of the Act of September 23, 1950, to permit a holding that this transfer was "in contemplation of death." If we are right in this, the same result should now be reached, in view of the definition of "contemplation of death" inherent in the 1950 Act, in cases (like the present case) involving the estates of decedents who died before the effective date of that Act.

The Court of Appeals (Appendix A, *infra*, pages 21-22) gave as a "short answer" to Petitioners' argument based on the 1950 Act the fact that Decedent died in May, 1949, before the effective date of the Act. Had Decedent died after the effective date of the Act there would have been no issue (the relinquishment of power having been made more than three years before her death). The "short answer" does not answer, but ignores, our argument.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. BENJAMIN,
Counsel for Petitioners.

November, 1957

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 321, 322, 323—October Term, 1956.

(Argued May 15, 1957 Decided August 30, 1957.)

Docket Nos. 24345-6-7

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ESTATE OF MARY LOIS K. McINTOSH, deceased, RUSSELL L. McINTOSH and EMPIRE TRUST COMPANY, Executors,
Petitioners.

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

———::———

ESTATE OF MARY LOIS K. McINTOSH, deceased, RUSSELL L. McINTOSH and ST. LOUIS UNION TRUST COMPANY, Trustees and Transferees,
Petitioners.

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

———::———

ESTATE OF MARY LOIS K. McINTOSH, deceased, EUGENE KILPATRICK PERRY, Transferee,
Petitioner.

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

———::———

Appendix A

Before:

CLARK, *Chief Judge*,

SWAN and POPE, *Circuit Judges*.

———::———

On Petition to Review Decisions of the Tax Court of the United States.

The Commissioner of Internal Revenue determined a deficiency in estate tax due from the Estate of Mary Lois K. McIntosh. The Estate and transferees of certain assets which the Commissioner included in the Estate for estate tax purposes filed three separate petitions for a redetermination of the deficiency in the Tax Court of the United States. After decisions of the Tax Court sustaining the Commissioner's determination, said petitioners have filed petitions for review of such decisions in this court. Affirmed.

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PULLMAN, COMLEY, BRADLEY & REEVES, *Attorneys for Petitioners in Nos. 24345 & 24346*, PARKER, DURYEE, BENJAMIN, ZUNINO & MALONE, *Attorneys for Petitioner in No. 24347;* Robert M. Benjamin, Arthur M. Comley, Raymond A. Carter, Frederick Pope, Jr., and Sidney D. Rosoff, of Counsel.

CHARLES K. RICE, Assistant Attorney General. Ellis N. Slack, Lee A. Jackson and Morton K. Rothschild, Attorneys, *for Appellee-Respondent.*

———::———

POPE, *Circuit Judge:*

The petitioners here are the Estate of Mary Lois K. McIntosh, deceased, and the above named transferees from

said estate. The Commissioner determined a deficiency in estate tax due from that estate, and determined the same deficiency against the other petitioners as transferees. Separate petitions for redetermination were filed in the Tax Court, but since the petitioning transferees conceded that if a deficiency was determined against the estate, the same decision must be made against them, all three petitions were consolidated for hearing in the Tax Court. Following the Tax Court's decisions upholding the Commissioner's determinations of deficiency, petitions to review were filed here, and all three were consolidated for briefing and hearing in this court.

The findings and opinion of the Tax Court are reported at 25 T. C. 794. Because we assume familiarity with those findings we make no effort to repeat them here. The Tax Court upheld the Commissioner on two separate grounds. In affirming we find it unnecessary in this opinion to do more than indicate the reasons why we approve the Tax Court's finding that the decedent released her power of appointment in contemplation of death within the meaning of § 811(d)(2) of the Internal Revenue Code of 1939.[1]

The deficiency here involved arises from the determination of the Commissioner that there should be included in

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[1] "Sec. 811. Gross Estate. * * * (d) Revocable Transfers.—* * * (2) Transfers on or Prior to June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph."

the estate for estate tax purposes the value of the property transferred in trust in 1929 by the trust instrument set out in the Tax Court's opinion. Under that trust, property previously owned by Mary Lois K. Perry (later Mary Lois K. McIntosh), the decedent, was conveyed to trustees to be held in trust "for the sole use and benefit of Mary Lois K. Perry * * * for and during her natural life," the entire net income to be paid to her in monthly installments. Following further provisions that she should have no power to sell, assign or anticipate any interest created by this instrument, it was provided as follows:

> "On the death of the said Mary Lois K. Perry, the trust hereby created shall end, and the entire trust estate created by this instrument, together with any and all accumulated and undistributed income therefrom, shall go to such parties and under such terms and conditions as the said Mary Lois K. Perry may, by her last will, direct. In the event that the said Mary Lois K. Perry shall die intestate, or should fail to exercise said power by her last will, then, on her death, the entire trust estate hereby created, together with any and all accumulated and undistributed income therefrom, shall go and pass to the then heirs at law of the said Mary Lois K. Parry [*sic*], under the statutes of descent and distribation of the State of Missouri, free of any trust whatever. * * * "

It was the power of appointment stated in the first sentence just quoted which was relinquished by the "Release of Power" copied in the Tax Court's findings. The case turns upon the question whether that relinquishment by Mary Lois K. McIntosh was in contemplation of her death within the meaning of § 811(d)(2).

The evidence was that for a considerable period prior to the execution of this "Release of Power," which occurred on November 4, 1943, Mrs. McIntosh had been seeking ad-

vice, and taking certain steps designed to avoid the payment of estate taxes. In 1941 the corporate trustee under the trust wrote her, answering an inquiry as to whether she could make a present assignment of trust income to her son, as follows:

> "• • • You cannot make a valid assignment of this income to your son, or in fact to any one, as it appears from the terms of this trust that the intention was to be certain that you personally receive the income produced by this trust fund. You do have the right to dispose of this fund in your will but from a tax standpoint it would seem desirable, if it is your desire that your son have this property, that you do not exercise this right.
>
> "You should, of course, have a will disposing of the property that you have other than that which is contained in this trust estate. The federal tax authorities under present practice tax the exercise of a power of disposition the same as if you owned the property if the power of disposition is exercised. If this power to dispose of the trust property is not exercised and this property is allowed to go to your son under the trust agreement, there would be a definite tax advantage. This does not mean that you shouldn't make a will. We strongly recommend that you have your attorney draw your will and advise you on these matters as we cannot undertake to give legal advice, and we would suggest that in the drafting of your will the tax situation be given full consideration."

As a result of this suggestion of the trustee, decedent consulted an attorney and made a new will which specifically refrained from exercising the power. This new will replaced an old one in which she had undertaken to exercise the power of appointment. Then came the Trustee's suggestion of May 27, 1943, that in the light of certain changes

in the 1942 Revenue Act, it would be well for decedent to review her power under the trust instrument. Upon advice of counsel she then executed the "Release of Power" above referred to. The letter from her attorneys, on which she acted, was devoted wholly to discussion of the recommended action as a procedure designed to avoid estate taxes.[2] The decedent's husband testified before the Tax Court that he knew of no reason for the relinquishment of the power other than the saving of taxes.

We think it clear that the power of appointment quoted above, whereby "the entire trust estate" should be made to "go to such parties and under such terms and conditions as the said Mary Lois K. Perry may, by her last will, direct," was, because of the circumstances attending the creation of the trust a reserved power, —a power "to alter, amend, or revoke," within the meaning of §811(d)(2) (footnote 1, *supra*). These circumstances were the manner in which decedent conveyed the properties to a young lawyer who executed the trust instrument merely as the nominal settlor of the trust. Hence the interest here involved was, in the language of §811(d)(2), one "of which the decedent • • • has made a transfer." *Lehman* v. *Commissioner*, 2 Cir., 109 F. 2d 99, 100.[3] And the power here was one to

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[2] The Tax Court alluded to the fact that decedent thought her relinquishment of the power would result in nontaxability. Petitioner suggests this was the result of an honest mistake on the part of both the attorneys who were not aware of the background of the trust which required the power to be treated for this tax purpose as a reserved rather than a donated power. Petitioners concede the correctness of the statement in footnote 2 of the Tax Court's opinion that the section of the Revenue Act of 1942 on which the attorney's advice was based had reference to donated powers only, and not to reserved powers as referred to in § 811(d).

[3] That case dealt with § 302(d) of the Revenue Act of 1932, the wording of which was the same as that of § 811(d) so far as here material. Other cases which have followed the *Lehman* case are cited in *Newberry's Estate* v. *Commissioner*, 3 Cir., 201 F. 2d 874, 877.

"alter, amend or revoke." Cf. *Lober* v. *United States*, 346 U. S. 335, *Comm'r* v. *Estate of Holmes*, 326 U. S. 480, *Porter* v. *Commissioner*, 288 U. S. 436.

This brings us to the final question, is the finding that the decedent relinquished the power in contemplation of her death a proper one upon this record? Although conceding that when she made the release decedent was in good physical condition and had no particular concern about dying, the court found that her purpose in releasing the power was to save estate taxes,—this was her "dominant motive." The evidence sufficiently sustains that finding. We see no basis on which it could be held to be clearly erroneous. This court has sustained a holding that transfers were made in contemplation of death when their preponderant motive was avoidance of estate taxes. *Slifka* v. *Johnson*, 2 Cir., 161 F. 2d 467, following *Vanderlip* v. *Commissioner*, 2 Cir., 155 F. 2d 152. The record abundantly justified a finding that "the thought of death [was] the impelling cause" of the release.[4]

Petitioner argues that decedent could have had no such dominant motive, for it was not she but the corporate trustee which took the initiative; that all that she did reflected "the passivity of her thought." Her acquiescence in the advice of others does not alter the fact that the advice she accepted was designed to avoid estate taxes. We agree with the Tax Court that it is immaterial that some of this advice was mistaken. (See footnote 2 above.) Petitioners note that in 1950 Congress added a new subdivision to §811 to the effect that no relinquishment made more than three years prior to date of death should be deemed to have been made in contemplation of death. (Act of September 23, 1950, 64 Stat. 962.) It is suggested that this indicates a Congressional disapproval of a holding such as that made by the Tax Court here where there is no showing that

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[4] The quoted language is from *United States* v. *Wells*, 283 U. S. 102, 118.

death was thought to be close at hand. The short answer is that the amendment thus made was expressly made applicable only to estates of decedents dying after that date. This decedent died May 21, 1949.

It is argued that the facts here are not distinguishable from those in *Allen* v. *Trust Co.*, 326 U. S. 630, where an opposite conclusion was reached. In that case, it appeared that the relinquishment of the power was made for the purpose of accomplishing fully, and in line with his original intention, decedent's purpose when he established trusts for his children, namely, to make complete gifts, freed of all claims, including taxes. On those facts two courts found the release was not made in contemplation of death. Here, on the contrary, the court entrusted with finding the facts has found, on sufficient evidence, that there was contemplation of death. The relinquishment here, made on November 4, 1943, cannot be related to an earlier effort to make a disposition having a "life intent," for the earlier actions in 1941 when the decedent substituted a new will specifically refraining from exercising the power, were all taken with the same purpose of avoiding taxes.

The decisions of the Tax Court are affirmed.

APPENDIX B

Judgments of the Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of August one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge
HON. THOMAS W. SWAN,
HON. WALTER L. POPE,
Circuit Judges

ESTATE OF MARY L. K. McINTOSH, et al
(EMPIRE TRUST CO.)
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

Appendix B

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. Daniel Fusaro, Clerk
by Ralph C. Curcio,
Deputy Clerk

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of August one thousand nine hundred and fifty-seven.

Present:

Hon. Charles E. Clark,
Chief Judge
Hon. Thomas W. Swan,
Hon. Walter L. Pope,
Circuit Judges

Estate of Mary L. K. McIntosh, et al
(St. Louis Union)
Petitioners

v.

Commissioner of Internal Revenue
Respondent

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. DANIEL FUSARO, Clerk
by RALPH C. CURCIO,
Deputy Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of August one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge

HON. THOMAS W. SWAN,
HON. WALTER L. POPE,
Circuit Judges

ESTATE OF MARY L. K. McINTOSH, Deceased, EUGENE KILPATRICK PERRY, Transferee
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent

Appendix B

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

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A. Daniel Fusaro, Clerk
by Ralph C. Curcio,
Deputy Clerk

APPENDIX C

Statutes

Internal Revenue Code of 1939, Section 811(d)(2):

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

• • •

(d) REVOCABLE TRANSFERS.—

• • •

(2) TRANSFERS ON OR PRIOR TO JUNE 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

Act of September 23, 1950, Section 501(a)

SEC. 501. TRANSFERS IN CONTEMPLATION OF DEATH.

(a) Transfers, etc., in contemplation of death.—Section 811 (relating to gross estate) is hereby amended by striking out "(1)" at the beginning of

subsection (l) and inserting in lieu thereof "(m)", and by inserting after subsection (k) the following new subsection:

"(l) Contemplation of death.—If the decedent within a period of three years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of subsections (c), (d), and (f); but no such transfer, relinquishment, exercise, or release made prior to such three-year period shall be deemed or held to have been made in contemplation of death."

Revenue Act of 1942, Section 403:

SEC. 403. POWERS OF APPOINTMENT

(a) General rule. Section 811(f) (relating to powers of appointment) is amended to read as follows:

"**(f) Powers of appointment**

"**(1) In general.** To the extent of any property (A) with respect to which the decedent has at the time of his death a power of appointment, . . .

"**(2) Definition of power of appointment.** For the purposes of this subsection the term 'power of appointment' means any power to appoint exercisable by the decedent either alone or in conjunction with any person, except

"(A) a power to appoint within a class which does not include any others than the spouse of the decedent, spouse of the creator of the power, descendants of the decedent or his spouse, descendants (other than the decedent) of the cre-

ator of the power or his spouse, spouses of such descendants, donees described in section 812(d), and donees described in section 861(a)(3). As used in this subparagraph, the term 'descendant' includes adopted and illegitimate descendants, and the term 'spouse' includes former spouse; and

"(B) a power to appoint within a restricted class if the decedent did not receive any beneficial interest, vested or contingent, in the property from the creator of the power or thereafter acquire any such interest, and if the power is not exercisable to any extent for the benefit of the decedent, his estate, his creditors, or the creditors of his estate."

• • •

(d) Powers with respect to which amendments not applicable

• • •

(3) The amendments made by this section shall not apply with respect to any power to appoint created on or before the date of the enactment of this Act if it is released before January 1, 1943, or within the time limited by paragraph (2) in cases to which such paragraph is applicable; or if the decedent dies before January 1, 1943, or within the time limited by paragraph (2) in cases to which such paragraph is applicable, and such power is not exercised.

Office - Supreme Court, U. S.
FILED
DEC 31 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 625

ESTATE OF MARY LOIS K. McINTOSH, deceased, RUSSELL L. McINTOSH and EMPIRE TRUST COMPANY, Executors, et al.,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

ROBERT M. BENJAMIN,
Counsel for Petitioners,
1 East 44th Street,
New York 17, N. Y.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

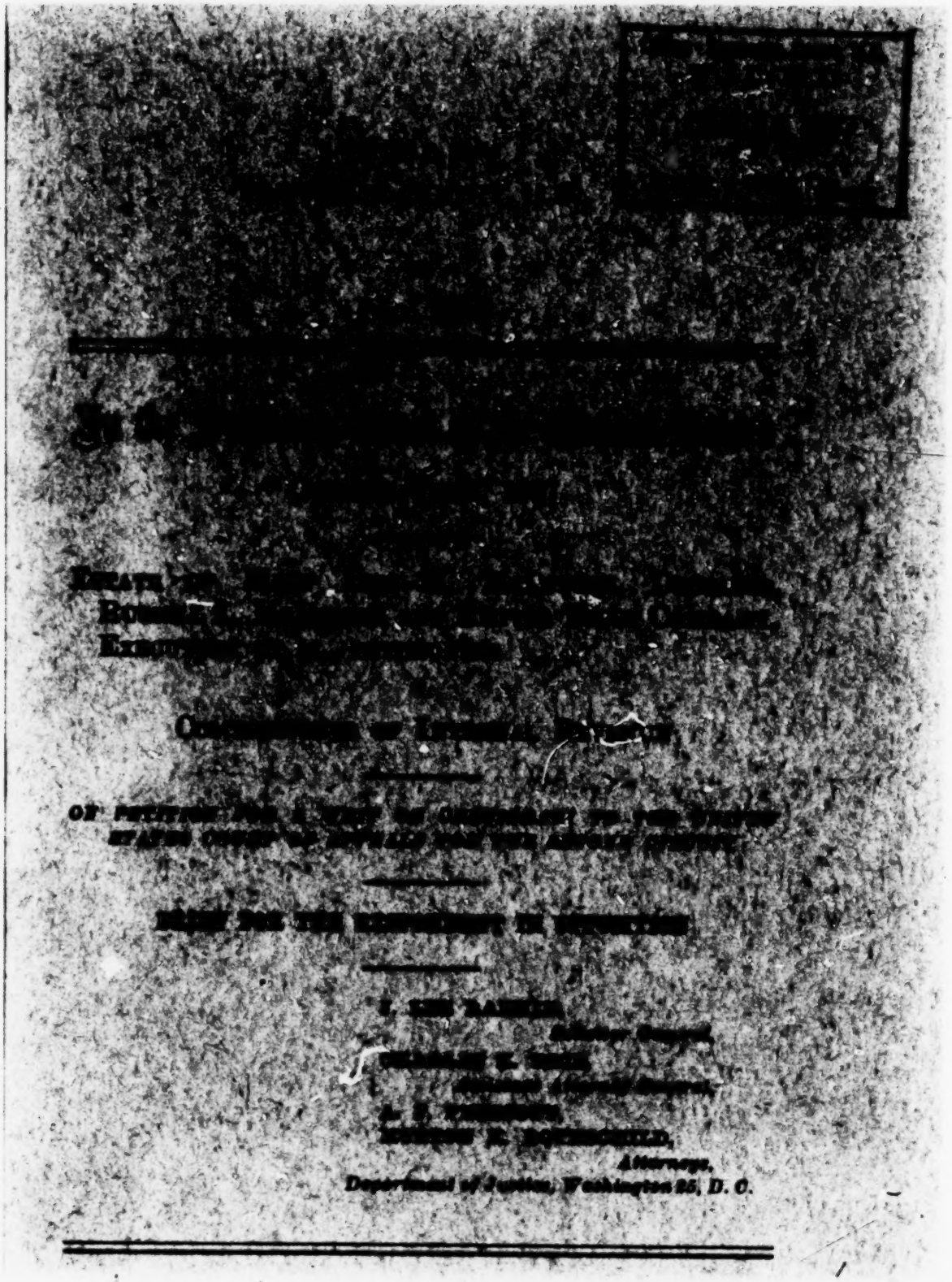
Beginning with its statement of the "Question Presented" (Resp. Br. 2), and continuing through its repetition of the "short answer" of the Court of Appeals to our second reason for granting the writ (Resp. Br. 11; see Pet. 14), the Brief for the Respondent in Opposition ignores the important questions of law, never decided by this Court, which we urge the Court to determine now (see Pet. 2), and treats the case as if it involved only the sufficiency of the evidence under undisputed criteria. Were that so, we should not have imposed on the time of this Court by filing a petition.

In view of the nature of the Brief in Opposition, the Petition, with its statement and development of the questions of law to be determined, will serve as a sufficient reply.

Respectfully submitted,

ROBERT M. BENJAMIN,
Counsel for Petitioners.

December, 1957.



Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 625

ESTATE OF MARY LOIS K. MCINTOSH, DECEASED, RUSSELL L. MCINTOSH AND EMPIRE TRUST COMPANY, EXECUTORS, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 6a–27a)[1] is reported in 25 T. C. 794. The opinion of the Court of Appeals (Pet. 15–22) is reported in 248 F. 2d 181.

JURISDICTION

The judgments of the Court of Appeals (Pet. 23–26) were entered on August 30, 1957. The petition for a writ of certiorari was filed on November 25, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

[1] Record references are to the Appendix to the taxpayer's brief filed in the Court of Appeals.

QUESTION PRESENTED

Whether there is sufficient evidence to support the concurrent findings of the Tax Court and the court below that the decedent's relinquishment of her reserved power of appointment was made in contemplation of her death within the meaning of Section 811 (d) (2) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (d) Revocable Transfers—
>
> * * * * *
>
> (2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a

transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

(26 U. S. C. 1952 ed., Sec. 811.)

* * * * *

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

SEC. 81.16 *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

* * * * *

STATEMENT

The facts as found by the Tax Court (R. 7a–14a), relating to the issue passed upon by the court below, may be summarized as follows:

Mary Lois K. McIntosh (hereinafter sometimes called the decedent) died on May 21, 1949, aged 63 years, nine months. Her executors filed an estate tax return on August 21, 1950, with the Collector of Internal Revenue for the District of Connecticut. (R. 7a.)

In 1928 the decedent was sued in an alienation of affections suit and as a result she turned over to her then husband certain negotiable securities for management. She soon became apprehensive of her husband's management of the property and sought assistance in securing its return. (R. 7a.)

These troubles worried the decedent (who was then Mary Lois K. Perry) and for the purpose of protecting her properties against herself and generally against the misapplication of her funds she arranged for the creation of a trust on February 16, 1929. On that date she conveyed certain of her properties to Thomas J. Boland, a young lawyer in the office of Paul Bakewell, Jr. Boland, as nominal settlor, on the same day conveyed the properties to the St. Louis Union Trust Company and to Bakewell, as trustees, under a written trust instrument. The use of Boland as nominal settlor was made in an attempt to avoid the rule of Missouri law that a settlor cannot create a spendthrift trust for his own benefit. The trust that was created and is here involved is a spendthrift trust. (R. 7a–8a.)

The trust instrument provided, *inter alia*, that the trust should continue for the sole use and benefit of Mary Lois K. Perry during her life; that the trustees should pay the entire net income from the trust to Mary Lois K. Perry in monthly installments; that on the death of Mary Lois K. Perry, the trust should end and the entire trust estate should go to such parties as Mary Lois K. Perry might, by her last will, direct; and that in the event Mary Lois K. Perry should die intestate, or should fail to exercise the power by her last will, then, on her death, the entire trust estate should go to her heirs at law under the laws of Missouri. (R. 8a–10a.)

The decedent executed a will on May 10, 1935, with a codicil dated April 8, 1936, in which she undertook to exercise the power of appointment contained in the trust instrument. (R. 12a.) In June 1941, the corporate trustee wrote to the decedent advising her that there would be a tax advantage if she did not exercise the power of appointment and suggesting that she consult her attorney. (R. 11a–12a.) As a result of this suggestion, an attorney was consulted and a new will was executed on July 14, 1941, in which the decedent specifically refrained from exercising the power. (R. 12a.)

Later, on May 27, 1943, in accordance with its policy of reviewing all trust instruments providing for a power of appointment, the corporate trustee advised the decedent by letter that her powers under the trust instrument should be reviewed in the light of changes in the tax laws contained in the Revenue Act of 1942.

Following this advice, an attorney was employed. He advised that the property in the trust would be taxable as part of the decedent's estate unless the power of appointment was released by her before March 1, 1944. (R. 12a–13a.) Accordingly, the decedent executed the following "Release of Power" on November 4, 1943 (R. 13a–14a):

> *Whereas*, the undersigned is desirous of releasing and relinquishing the said power of appointment forever to, and in favor of, the persons who may be or become entitled to receive the property heretofore subject to the said power of appointment in the event that such power be not exercised,
>
> *Now, therefore*, the undersigned does hereby, irrevocably and forever, release and relinquish all power which she now has, or at any time hereafter may have had, to direct, nominate, or appoint the parties to whom the Trust Estate created by the Deed of Trust dated February 16, 1929, made by Thomas J. Boland, and any and all accumulated and undistributed income therefrom, shall go upon the termination of the said Trust, or to impose any terms and conditions with respect to the final distribution of said Trust Estate, and
>
> The undersigned does hereby covenant with Russell L. McIntosh and St. Louis Union Trust Company as Trustees of said Trust, for and in behalf of the heirs at law of the undersigned, under the statutes of descent and distribution of the State of Missouri, and with Eugene Kilpatrick Perry, the sole apparent heir at law of the undersigned under such statutes, that there is not now in existence any will or other

testamentary document executed by her which purports to exercise the aforesaid power of appointment, and that she will not hereafter execute any such will or testamentary document.

The decedent's purpose in releasing the power of appointment was to save estate taxes. At the time she executed the release of power of appointment, the decedent was in good physical condition for a woman of her age, and she had no particular concern about dying. (R. 14a.)

The Commissioner determined a deficiency of $254,759.76 in estate tax to be due from the estate of Mary Lois K. McIntosh. The same deficiency has been determined against the other petitioners as transferees. (R. 7a.)

The Tax Court decided that the decedent was the real settlor of the trust set up in 1929 and should be considered as having made the transfer in trust (R. 16a); that the decedent was the only beneficiary under the trust and, consequently, had the power to revoke the trust under Missouri law; and that the value of the trust property is includible in her gross estate under Section 811 (d) (2) of the Internal Revenue Code of 1939 (*supra*, pp. 2–3) (R. 19a). The Tax Court also decided that the dominant motive of the decedent in relinquishing the power of appointment was to save estate taxes, and therefore the relinquishment was in contemplation of death. (R. 23a–25a.) Decisions were entered against the decedent's estate for a deficiency in estate taxes in the amount of $235,872.10 and against the trustees and the decedent's son for transferee liability in a corresponding amount. (R. 3a–

5a.) The decedent's estate and the transferees appealed to the court below.

The court below unanimously held that the Tax Court was correct in finding that the decedent released her power of appointment in contemplation of death within the meaning of Section 811 (d) (2). It was therefore unnecessary to consider the other question decided by the Tax Court or the alternative argument made in the Government's brief in the court below. (Pet. 17.)

ARGUMENT

Petitioners do not question the rulings below that the power reserved to the decedent in the 1929 trust was a power to alter, amend, or revoke within the meaning of Section 811 (d) (2) of the Internal Revenue Code of 1939 (*supra*, pp. 2–3). The sole question raised by the petition is whether on the record the two courts below were justified in finding that decedent relinquished that power in contemplation of her death.

The decision of the court below is correct. Section 811 (d) (2) provides in part that the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property to the extent of any interest therein of which the decedent has at any time made a transfer by trust, where he relinquished the power to alter or amend in contemplation of his death. Here, disregarding the conveyance by the decedent to the straw man, she created a trust in 1929 reserving the entire

net income to herself for life and also reserving the power to appoint by will the corpus.[2] (R. 7a–10a.) That the power to appoint by will the corpus is a power to alter or amend within the meaning of the statute is not questioned here. On November 4, 1943, the decedent formally relinquished her power of appointment (R. 13a–14a), and the only question considered by the court below was whether the decedent relinquished that power in contemplation of death under the terms of the statute. Under decisions of this Court in analogous cases, the test is whether the thought of death is the impelling cause of the transfer. *United States* v. *Wells*, 283 U. S. 102, 119; *City Bank Co.* v. *McGowan*, 323 U. S. 594, 599; *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630, 635.

The Tax Court found that the decedent's dominant motive in releasing her power of appointment was to save estate taxes. (R. 23a.) In support of that conclusion, the Tax Court referred to the letter of May 27, 1943, in which the decedent was advised by the corporate trustee that because of recent changes in the federal tax law her possession of a power of appointment could cause the value of the trust property to be included in her estate for estate tax purposes. (R. 23a, 29a, 38a.) The Tax Court also referred to a letter dated June 23, 1943, received by the decedent's husband, in which he was advised by a lawyer that decedent would have to give up the power of appointment to keep the value of the trust property from

[2] The petitioners do not dispute the fact that the power is a reserved power rather than a donated power, even though the trust was nominally created by a third party. (Pet. 7.)

being included in her estate under certain amendments to the estate tax law enacted in 1942. (R. 23a, 29a, 30a, 41a–43a.) The Tax Court found also that the decedent acting on this advice executed the release dated November 4, 1943. (R. 23a, 29a, 44a–46a.) In addition to the above mentioned evidence, the decedent's husband testified that he knew of no other reason for the relinquishment of the power by the decedent than to save taxes. (R. 67a.) The court below referred to this testimony (Pet. 20) and correctly decided that the evidence sustains the Tax Court's finding that the decedent relinquished the power in contemplation of death. (Pet. 21.)

The motive to avoid estate taxes is clearly a death motive rather than a life motive. *Vanderlip* v. *Commissioner*, 155 F. 2d 152 (C. A. 2d), certiorari denied, 329 U. S. 728; *Slifka* v. *Johnson*, 161 F. 2d 467 (C. A. 2d), certiorari denied, 332 U. S. 758. To the same effect is Section 81.16 of Treasury Regulations 105 (*supra*, p. 3), which provides in part that a transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax.

No reason appears for review of the concurrent findings of the Tax Court and the court below that the decedent's dominant motive in releasing the power of appointment was a death motive and that the power to amend was relinquished in contemplation of death within the meaning of Section 811 (d) (2). The petitioners do not allege that there is a conflict of decisions, and there is none. With respect to *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630, cited by the petitioners (Pet. 12), there the trier of fact, affirmed on

review, found that the decedent did *not* relinquish his power to amend the trusts in contemplation of death, whereas in this case the trier of fact, affirmed by the court below, found that the decedent *did* relinquish her power of appointment in contemplation of death. The difference in result is attributable, not to any real difference in legal criterion, but rather to the substantial factual differences, noted by the court below (Pet. 22), between the two cases.

There is no merit to the petitioners' argument that this Court should determine the relevance of Section 501 (e) of the Revenue Act of 1950, c. 994, 64 Stat. 962 (26 U. S. C. 1952 ed., Sec. 811), to the present case (Pet. 12–14). Section 501 (e) of the 1950 Act expressly provides that the amendment shall be applicable only with respect to estates of decedents dying after the enactment of that Act (September 23, 1950). The decedent having died on May 21, 1949 (R. 7a), the amendment does not apply.

CONCLUSION

The decision of the court below is correct, there is no conflict, and no question of general importance is presented. Accordingly it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

A. F. PRESCOTT,
MORTON K. ROTHSCHILD,
Attorneys.

DECEMBER 1957.